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**THE PROTECTION OF CONFIDENTIAL INFORMATION
UNDER THE PROJECTED CHEMICAL WEAPONS CONVENTION**

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This paper consists of three parts: the first provides an overview of the provisions for the protection of confidential information included in some major arms control agreements; the second contains an analysis of the problems relating to the inclusion in the Chemical Weapons Convention (CWC) of specific provisions aimed at protecting confidential information; the third deals with verification procedures with the purpose of identifying measures which could prevent the loss of confidential information during verification activities.

The first part focuses on those procedures established in the examined arms control agreements which can also have relevance for the CWC.

In the second part particular attention is devoted to the structure of the Annex on the Protection of Confidential Information and its relationship with the other parts of the Rolling Text (RT) of the CWC which concern, more or less directly, the confidentiality issue.

The third part draws on the experience gathered in the National Trial Inspections (NTIs) as well as on the suggestions contained in some thematic working papers presented by the single States to the Conference on Disarmament. Beyond being a means for preparing the States for their future role of parties to the projected CWC, the NTIs provide a great deal of useful information for a possible improvement of the provisions of the convention.

1. Introduction

In the last few years, as a result of the change in Soviet foreign policy and the dissolution of East-West bipolarism, the arms control process has been moving, at both the bilateral (US-Soviet) and multilateral levels, towards increasingly demanding and comprehensive objectives. In particular the verification regimes included in the most recent disarmament agreements contain provisions of unprecedented stringency and degree of intrusiveness.

The collection, exchange and storage of data and information have thus acquired a growing importance for the implementation of arms control agreements. The need to establish effective measures to avoid the disclosure or misuse of confidential information during the verification activities has consequently come to the fore. In fact, the abuse or misuse of the verification rights - i.e. their use for purposes other than the assessment of compliance - can create a climate of distrust and suspicion which can, sooner or later, undermine the confidence on which any arms control agreement is necessarily based. The problem of an adequate

protection of confidential information is complicated by the fact that the growing application of the new technologies to military systems increasingly tends to blur the distinction between peaceful civil activities and the military ones.

In the last few years, in the context of a growing effort to define general principles for carrying out verification activities, the United Nations has also addressed the confidentiality issue. Of particular importance is the resolution 43/81B of 7 December 1988 by which the General Assembly endorsed a set of 16 principles of verification elaborated by the Disarmament Commission. Principle 5 of the resolution states that "Verification in arms limitation and disarmament process will benefit from greater openness". Principle 14 reinforces this statement: "Requests for inspections or information in accordance with the provisions of an arms control and disarmament agreement should be considered as a normal component of the verification process", adding, however, that "Such requests should be used only for the purposes of the determination of compliance, care being taken to avoid abuses". According to the subsequent Principle 15, the implementation of verification arrangements shall avoid: (i) "unduly interfering with the internal affairs of States Parties or other States"; (ii) "jeopardizing their economic, technological and social development".

Furthermore, it is worth mentioning that in a recently published study on the role of the United Nations in the field of verification commissioned by the General Assembly a group of governmental experts has proposed to create a "UN data collection service" with the task of compiling, storing and disseminating useful data relating to verification of existing arms control agreements (1). The acquisition by the United Nations of this capability would be designed *inter alia* to contribute to an impartial and non-discriminatory handling of information.

The problem of the protection of confidential information is perceived as particularly acute and crucial in the Geneva negotiations on the CWC. The structure and scope of the verification regime on which the CWC will rely is still a matter of discussion. Yet, there is a widely shared awareness that the implementation of the CWC could pose the highest risk of loss of confidential information ever encountered in arms control. A difficult balance has to be reached between the degree of intrusiveness necessary for effective verification and the preservation of legitimate confidentiality. This aim has to be pursued through the establishment of both general rules and specific measures for each phase and aspect of the verification process. The inclusion in the CWC of principles such as that of 'the need to know basis' is certainly useful, but it is likely to prove ineffective if not adequately supported by the identification of means and procedures capable of minimizing the risk of compromising sensitive and classified information.

The problem of the protection of confidential information in the CWC arises from two major sources of concern: the potential loss of confidential business information (CBI) which is understandably emphasized by the chemical industry and the risk that the legitimate security interests of the States Parties could be damaged. The attitudes towards these two aspects of the problem have been evolving over time.

Since the negotiations on the CWC received new impetus - thanks to international pressure following the use of chemical weapons during the Iran-Iraq war and to the new climate in US-Soviet relations - the major associations of the Western chemical industry have adopted a cooperative approach. They have declared their support in principle for the projected CWC while at the same time insisting on the need for an adequate protection of CBI. This new approach has made possible the holding of regular meetings in Geneva between the negotiators

and the representatives of the chemical industry, a practice which has proved highly useful. At the same time, various forms of cooperation and consultation between the governments and the chemical industry have taken place at the national level. The issue of the protection of CBI was also at the very centre of the Canberra Conference of 18-22 September. Many associations of the chemical industry, besides confirming their support for the projected CWC, declared on this occasion their willingness to pave the way for its completion through the adoption of self-monitoring and self-regulating measures. More recently, during a meeting with CD delegations (24-27 June 1991) the representatives of the major chemical industry associations submitted a joint document containing a set of proposals concerning the system of verification of non-production of chemical weapons. It is important to stress here that the active involvement of chemical industry associations in the discussion of some crucial problems of the CWC can significantly contribute to the finding of balanced solutions as well as to the creation of the necessary domestic consensus for the CWC in the individual states.

The strict monitoring to which the chemical industry is subject in many industrialized countries for the purpose of protecting health and the environment constitutes another useful experience which should be taken into account when finalising the verification regime of the CWC. Although this control on the chemical industry by the public administration is generally far from being of the level required to verify the projected CWC effectively, it does pose the problem of the protection of the CBI and can hence provide some useful indications.

After staying in the background for some time, the other source of concern, i.e. the compromising of national security because of leaks of sensitive information, has recently been gaining topicality. Some developing countries appeal to it to justify their reluctance to accept some verification mechanisms they regard as highly intrusive. It is also the main reason for the growing tendency which seems to be taking root within the US administration to call into question the unconditionally mandatory nature of inspections on request in favor of a limited right of refusal. As inspections on request represent a cornerstone of a CWC verification regime, the identification of adequate measures to protect confidential information relating to inspected State facilities (especially military ones) appears to be a vital objective.

2. The Protection of Confidential Information in Some Major Arms Control Agreements

2.1. The IAEA Safeguards System

The extent to which the IAEA safeguards system can serve as a useful model for the CWC verification regime is a matter of discussion.

On one hand, the IAEA safeguards present significant similarities with the projected CWC. First, the field of application of IAEA safeguards is characterized by significant economic and industrial interests. Second, unlike most arms control agreements, the verification system on which IAEA safeguards rely is managed not at purely national level, but at the level of international organization. Third, the protection of national sovereignty as well as peaceful industrial activities during on-site inspections is a central institutional goal of the IAEA.

On the other hand, the differences are far from being negligible. First, the IAEA is charged with two somewhat competing tasks - verification and technical assistance -, which complicates its functioning; the CWC Organization will be able to concentrate its efforts on the

former. Second, the IAEA safeguards are essentially based upon the 'end-use' concept as they are aimed at preventing the diversion of otherwise permitted materials and production processes. In contrast, the projected CWC has a more ambitious objective, focusing on non-production of chemical weapons and non-production or non-consumption of some chemicals above fixed thresholds. Third, the material accountancy on which the IAEA safeguards are based is applied to only three chemicals (plutonium, thorium and uranium) the detection of which is also facilitated by their radioactivity. The CWC verification regime will instead include a very large number of chemicals which can only be detected with the use of a wide range of sophisticated equipment.

These similarities and differences have to be taken into account carefully in any attempt to draw useful lessons for the CWC verification system from the IAEA experience. This precaution has also to be taken in regard to the problem of the protection of confidential information. Generally speaking, it must be stressed that the CWC verification regime will have not only a much larger scope but also a higher degree of intrusiveness than that of the IAEA regime.

The IAEA staff is bound, pursuant to the Agency's Statute (Article 7), to two fundamental obligations relevant for the protection of confidential information: (i) not to "seek or receive instructions from any source external to the Agency"; (ii) not to "disclose any industrial secrets or other confidential information coming to their knowledge by reason of their official duties for the Agency".

In addition, all safeguards agreements include the commitment by the Agency to abstain from undue interference in the activities of the nuclear industry having peaceful purposes and to ensure the protection of confidential information. Document INFCIRC/153 containing the safeguards model agreement related to non-nuclear states parties to the Non-Proliferation Treaty states that "The Agency shall not publish or communicate to any State, organization or person any information obtained by it in connection with the implementation of the Agreement" (§ 5). Information relating to facilities shall be kept to the minimum level necessary for carrying out the verification duties (§ 8). In particular, the examination of information collected during inspections shall be examined on the premises of the inspected State (*ibidem*) which also has the right to send its representatives as escort team for inspectors (§ 87). Furthermore, the designation of inspectors requires the approval from the State on whose territory the inspection will be performed (§ 9).

These provisions are reinforced by the rules concerning the Agency's administrative procedures which assign the central role in promoting, regulating and supervising the protection of confidential information to the Director General. Information can only be made public with his authorization. In general, the release of information by the Agency is subject to a tight control and the results of the verification activity are treated as confidential. The Director General also has the duty to establish how the staff shall manage classified information. Furthermore, he is empowered to impose disciplinary measures on staff members who do not comply with the procedures for handling confidential information.

The IAEA is generally considered to have been successful in managing the confidentiality issue. In fact, the cases of alleged misconduct of its staff have been few and not very significant. Rather, the principal concern today regards the capacity of the Agency to furnish early and updated information on the evolution of nuclear proliferation making possible the adoption of quick countermeasures. Indeed, there have been growing calls for the Agency to

increase the transparency of its activities, providing the public with more detailed information. In this respect, the IAEA experience seems to point out the risk of exaggerating the confidentiality problem, establishing too stringent a regime for the protection of sensitive information with the result of hampering the transparency needed to create and preserve confidence in the effectiveness of the arms control treaties.

2.2. The INF Treaty

The verification mechanism of the INF treaty is based on a complex System of six different types of on-site inspections (Article XI). However, challenge inspections of undeclared facilities are not included. Furthermore, on-site inspections are not applied to missile production facilities, except for continuous portal monitoring. In fact, the US refused during negotiations to subject production facilities to a more intrusive verification, putting forward the need to protect national security.

The main provisions relevant for the protection of confidentiality are contained in the Protocol on Inspections. Section III of the Protocol concerning "Pre-Inspections Requirements" states the right of each party "to review the other Party's lists of aircrew members and inspectors". The parties had to submit two different lists for inspectors and aircrew members: (i) for continuous portal monitoring and (i) for the other types of inspections. Whilst each party can obtain the deletion of any individual included in the other party's list for portal monitoring - provided that it presents its objections 20 days from the time it receives the list -, such initial right of refusal is not granted for inspectors and aircrew members proposed for conducting the other types of on-site inspections. Their removal can only be obtained by the inspected party on the basis of a precise motivation notified to the inspecting party.

Section V of the Protocol concerning "Activities Beginning upon Arrival at the Point of Entry" gives the in-country escort the right to examine at the point of entry the equipment and supplies brought in by the inspectors. If the representatives of the inspected state ascertain that the technical features of any equipment or supplies are not consistent with the inspection requirements of the treaty, they can have them impounded at the point of entry.

Section VI concerning "General Rules for Conducting Inspections" states that "Inspectors shall not disclose information received during inspections except with the express permission of the inspecting Party. They shall remain bound by this obligation after their assignment as inspectors has ended". Beyond providing the in-country escort with the right to accompany inspectors and aircrew members during the in-country period, Section VI states that the characteristics and method of use of equipment for inspection has to be agreed on within 30 days after the entry into force of the treaty. Furthermore, only the inspected party has the right to operate measurement devices at the inspecting party's request.

Section VII establishes the procedures for physical on-site inspections. According to the physical characteristics of the single items and spaces and to what the inspected state declares about their content and use, increasing degrees of intrusiveness are foreseen, from the mere external visual observation to the out and out inspection through the appropriate devices. It is up to the inspected party to demonstrate that any shrouding and environmentally protected object is not an item subject to the treaty. To this end, the partial removal of the physical protection as well as other methods, such as measuring and weighing the covered object, are explicitly envisaged.

The body competent for intervening in any problem related to the implementation of the provisions of the treaty, including the protection of confidential information, is the Special Verification Commission (SVC) established by Article XIII.

2.3. The Vienna Document on CSBMs.

Exchange of information is at the very centre of the agreement on Confidence and Security Building Measures (CSBMs) signed in November 1990. The states parties agreed to exchange detailed information not only on the present structure of their military forces, but also on their future evolution, including data on military budget and plans for the deployment of major weapons and equipment systems. However, it must be stressed that the measures adopted in the document on CSBMs are not legally, but only politically binding. Article VIII of the document concerning "Verification and Compliance" establishes the mandatory nature of on-site inspections. The inspected Party still has the right to deny access to "sensitive points, facilities and equipment". Furthermore, representatives of the receiving State shall accompany the inspection team.

2.4. The CFE Treaty

The verification system of the treaty on Conventional Armed Forces in Europe (CFE) does not include on-site inspections to monitor the production of treaty-limited equipment (TLE) in the zone of its application (Atlantic-to-the Urals, ATTU). During negotiations the Western countries themselves held divergent views on this subject. Whilst the US supported monitoring of TLE production, France and Britain, in particular, judged it unacceptable, as it would have opened their industrial facilities to intrusive inspections without affecting those in the territory of the United States and Canada and in the Soviet territory east to the Urals. Challenge inspections are included, but, according to Section VIII of the Protocol on Inspections, the inspected state party has the right to refuse this type of inspection. Yet, in such case, the inspected state "shall provide all reasonable assurance that the specified area does not contain conventional armaments and equipment limited to the treaty".

The procedures governing the conduct of inspections under the CFE treaty are contained in the Protocol on Inspections. Protection of confidential information is based on the system of "sensitive points". According to Section I of the Protocol concerning "Definitions", "sensitive points" are defined as "any equipment, structure or location which has been designated to be sensitive by the inspected State Party or the State Party exercising the rights and obligations of the inspected State Party through the escort team and to which access or overflight may be delayed, limited or refused".

Section VI which sets forth the general rules for conducting inspections give the escort team the right "to deny access to sensitive points, the number and extent of which should be as limited as possible, to shrouded objects and to containers any dimension (width, height, length or diameter) of which is less than two meters". The escort team still has the obligation to declare whether the sensitive points, shrouded objects or containers to which it decides to deny access, holds any TLE. Additional provisions contained in Section VI of the Protocol provide for an articulated system of selected access. For example, inspectors are granted the right to look into a

hardened aircraft shelter to confirm visually the presence of any TLE, but they may enter the interior of hardened aircraft shelters only with the approval of the escort team. The primary criteria considered by the Protocol to establish the extent to which the inspected state has the right to deny or limit access to the inspecting team are the physical characteristics of the item, structure or area to be inspected compared with those of TLEs.

Section V of the Protocol also grants the right to the inspected state to examine at the point of entry the equipment and supplies brought by the inspection team into its territory and to deny the permission to use the items it finds capable of performing functions inconsistent with the treaty's provisions. Furthermore, Section III provides that each State Party has the right to obtain the deletion of any individual from the lists of inspectors and transport crew members provided by any other State Party. In addition, according to Section VI, if the inspected state ascertains that an inspector or aircrew member has not complied with the provisions of the Protocol, the inspecting state is bound, upon the request of the inspected state, to delete that person from its list of inspectors and aircrew members and to remove him or her from the territory of the inspected party.

A special responsibility for the production of confidential information is assigned to the Joint Consultative Group (JCG) established by Article XVI of the treaty. The JCG which is competent for the settlement of disputes arising out of the implementation of the treaty shall, in particular, "consider and work out appropriate measures to ensure that information obtained through exchanges of informations among the States Parties or as a result of inspections pursuant to this Treaty is used solely for the purposes of this Treaty, taking into account the particular requirements of each State Party in respect of safeguarding information which that State Party specifies as being sensitive". It must be noted that the JCG, like the other CSCE bodies, may only act - i.e. make decisions and recommendations - by consensus.

3. The Confidentiality Issue in the Rolling Text

The proposal to introduce in the CWC an annex specifically devoted to the protection of confidential information was made in a working paper presented by France in 1989 (2). The objective of this proposal was to give consistency and comprehensiveness to the provisions on this issue by putting them together in a single place in the RT. The decision to accept the French proposal, which led to the working out of the Annex on the Protection of Confidential Information, has left open the problem of the possible insertion of amendments and additions on the protection of confidentiality in some articles of the draft CWC. The introduction of more detailed provisions on confidentiality in the actual text of the convention can be considered a redundancy given the existence of a specific annex devoted to it. However, it would constitute an additional legal guarantee. In any case, a clear system of cross-references between the annex and the articles of the convention has still to be established.

The text itself of the Annex on the Protection of Confidential Information is far from being complete. It has indeed a fairly fragmentary form. What follows is an analysis of the different parts in which the Annex is divided with special regard to their connection with the articles of the Convention.

Part A: General Principles for the Handling of Confidential Information

This part which has an explicit connection with art. VIII (The Organization) assigns the primary responsibility for the protection of confidential information to the Director-General of the Technical Secretariat (TS). He is empowered to "establish a stringent regime governing the handling of confidential information by the Technical Secretariat" (3). To this purpose he shall follow a set of guidelines concerning the different directions of the flow of information which would take place during the implementation of the CWC. Among these guidelines the annex does not include an abstract definition of confidentiality. It instead gives the individual State or the Director-General the right to indicate whether the information is confidential or not:

Information shall be considered confidential if

- (i) it is so designed by the State Party from whom the information was obtained and to which the information refers; or
- (ii) in the judgement of the Director-General, its unauthorized disclosure could reasonably be expected to cause damage to the State Party to which it refers or to the mechanisms for implementation of the Convention (4).

This double judgement appears to be essential to ensure that both the interests of the State Party and the specific problems connected with the implementation of the Convention are taken into account. It must be noted that no reference is made to the possible proposals for the protection of confidential information which could come from private companies possessing facilities which would be subject to inspection. It is questionable that such a reference should be included. It could be more appropriate to establish that the States Parties shall take into account, where necessary, the suggestions of the companies involved in the verification activities.

Furthermore, the annex calls for the establishment of a specific unit of the TS to evaluate data and documents "in order to establish whether they contain confidential information" (5). The very nature of this evaluation, i.e. if and to what extent it shall consider the indications of the States Parties, should be defined.

Part A of the Annex is quite specific as regards information which may be released to the public. It states that the public may only be informed about the implementation of the Convention in general terms, "in accordance with the decisions of the Conference of the States Parties or the Executive Council"; it adds however that "Any information may be released with the express consent of the State Party to which the information refers"(6). Other aspects such as the storage of and the access to information and the determination of the type of information which may be removed from a facility are instead treated in a more general manner. For instance, three different types of storage sites for confidential information are mentioned

- the Organization, the national authority and the facility inspected -, but no defined criteria are provided for its distribution among them (7). In fact, the solution of these specific problems of the handling and protection of confidential information is considered dependent on the introduction of a classification system which "shall provide for clear criteria ensuring the inclusion of information into appropriate categories of confidentiality" (8). The annex states in particular that it is in accordance with this classification that the access to confidential information shall be regulated (9).

These references to a classification system to be elaborated pose two major problems. First, it is not defined which body of the Organization should be empowered to develop it. The most appropriate choice seems to be to assign this task to the TS. Secondly, an alternative option to be considered would be to include the classification system in the annex instead of

postponing its elaboration to some time after the completion of the convention. This could give the annex a more systematic and comprehensive shape as well as provide an additional guarantee to the States Parties.

A draft for a classification system of confidential information has been included in the Appendix II to the RT (10). It defines four categories of information corresponding to different levels of confidentiality:

- 1) Information which may be released for public use;
- 2) Information with distribution limited to States Parties to the Convention;
- 3) Information with distribution limited to Technical Secretariat;
- 4) Information which shall not be taken from the premises of the inspected facilities.

All the information acquired during the verification should be distributed among these categories. Specific rules are outlined for the handling of each category of information. The possibility of establishing procedures which allow the shifting of one type of information from one category to another is also envisaged. The objective is to construct a classification system which can be sufficiently precise and, at the same time, flexible. If it were incorporated into the Annex on the protection of confidential information this classification system could become the reference framework in which to include systematically the content of part A.

Part B: Employment and Conduct of Personnel in the Technical Secretariat

This part is also to be considered mainly in relation to the provisions of art.VIII, of which it can be considered a complement. It must be pointed out that art.VIII para.26 states that "The Director-General shall be responsible to the Conference of the States Parties and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat"(11). The central idea on which part B of the Annex is based is that specific rules shall regulate access to and the handling of confidential information by the members of the staff of the Technical Secretariat. An option included in brackets is the formal specification of the scope of access to confidential information for each employee on the basis of his or her position and functions in the Technical Secretariat. The fundamental obligation the members of the staff shall observe is not to "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" (12). To reinforce such an obligation the Annex establishes that each employee shall enter into individual secrecy agreements with the Technical Secretariat. As regards the inspectors, the annex states that in collecting information they shall strictly comply with the principle of the need to know basis. For the purpose of the protection of confidential information this obligation has to be considered as complementary to the provisions regulating the designation of inspectors and inspection assistants which are contained in the "Protocol on Inspection Procedures" (13).

Part C: Measures to Protect Sensitive Installations and Prevent Disclosure of Confidential Data in the Course of On-Site Verification Activities

This part gives the States Parties the right to play an active role in the adoption of measures aimed at protecting confidential information during on-site verification activities. This right can be exercised in two ways. First, the States Parties may take some measures on their

own initiative, "provided that they comply and demonstrate compliance with their obligations" (14). This provision is of particular relevance in view of the establishment of a system of managed access for on-site inspections (see below). Secondly, the States Parties have the right to propose to the inspection team specific procedures for the protection of sensitive equipment and information. It must be pointed out that the Protocol on Inspection Procedures foresees in case of inspection on request the right of the representatives of the inspected State Party to make suggestions for the modification of the inspection plan, provided that the final decision rests with the inspection team (15). Furthermore, as regards routine inspections, this part of the Annex states that facility agreements shall contain "specific and detailed arrangements" for the protection of confidential information (16). To this end one option which should be considered is the inclusion of a specific section relating to the confidentiality issue in the various models for the agreements on facility attachments. In general, the relationship between section C of the Annex and the Protocol on Inspection Procedures should be a subject of careful analysis.

Part D: Procedures in Case of Breaches or Alleged Breaches of Confidentiality

The Annex assigns the task of establishing procedures in case of breaches or alleged breaches of confidentiality by members of the staff of the TS to the Director-General of the TS who is also empowered to initiate the investigations and to impose punitive and disciplinary measures on them. In case of serious breaches he would be empowered to waive their immunity from legal process. The possibility is also discussed of giving the Director-General a set of clear guidelines for the imposition of punitive and disciplinary measures. It must be stressed that the annex excludes the responsibility of the Organization for any breach of confidentiality committed by members of the TS:

The annex also takes into account the case of breaches involving both a state party and the Organization, calling for the establishment by the Conference of the States Parties of a specific organ, the "Commission for the settlement of disputes related to confidentiality" (17). In fact, part D of the annex must also be considered in connection with Article XVI concerning "Settlement of Disputes" as cases of breaches or alleged breaches of confidentiality can become a source of disputes. However, it must be stressed that Article XVI does not address the cases of disputes between the states parties and the Organization.

Apart from the procedures the parties involved can adopt by mutual consent, Article XVI foresees a contribution to the settlement of dispute by the Executive Council, although the exact nature of this contribution has still to be defined (18). Furthermore, Article VIII assigns the Executive Council the duty to consider "doubts or concerns regarding compliance and cases of non-compliance, including, inter alia, abuse of the rights provided for by the Convention" (19). The breach of confidentiality can be considered a case of the abuse of the rights. If so, the Executive Council could take the related measures specified in the same Article VII. However, it must be noted that the annex makes no reference to a possible role of the Executive Council for the settlement of disputes concerning confidentiality.

Generally speaking, part D of the annex appears to be too vague and asystematic. It seems to be necessary that, as suggested in the original French proposal (20), a distinction be made between the various kinds of breaches of confidentiality, defining for each kind of breach the organ competent and the specific procedures to be followed.

An important gap in the Annex which has to be filled is the absence of provisions

regarding the obligations of the National Authority of the States Parties, except for a very general reference in part A (21). It must be noted that art.VII (National Implementation Measures) para.4 regarding the handling of confidential information by the States Parties refers to "the provisions set out in the Annex on the Protection of Confidential Information" (22). This gap is particularly relevant as the entire flow of information on which the projected CWC has to be based requires an active role by the National Authority. For this aspect as well the French working paper provides a set of suggestions which merit consideration (23).

4. The Inspection Regime and the Confidentiality Issue

As noted above, relevant aspects of the inspection regime for the projected CWC have still to be defined. Furthermore, even some important provisions included in the Rolling Text have begun to be questioned in the last few months mainly because of the growing concern about the high financial costs they would imply according to some evaluations. This concern regards in particular the provisions relating to routine inspections of declared facilities.

Apart from this more recent concern, two major problems have been a matter of intense discussion for some time.

First, although the awareness has been growing that the verification framework outlined in the Rolling Text covers too limited a number of production sites - only a small fraction of existing chemical facilities - and hence a system allowing for the broadening of the scope of on-site verification is needed, at present no new verification scheme has been incorporated into the Rolling Text. Thus, while costly and highly intrusive provisions have been worked out for a select number of facilities, the coverage of the system appears far from being satisfactory.

Secondly, the debate continues on the principles which should regulate inspection on request. The work of the Ad-Hoc Committee on this matter has so far been inconclusive. The most controversial issue is whether this kind of inspections shall be mandatory or include a more or less broad right of refusal. It must be noted that specific provisions regarding inspections on request are only contained in the Protocol on Inspection Procedures (24). The part of art.IX regarding the "Procedure for requesting a fact-finding mission" (25) remains to be elaborated. The outcome of the open-ended consultations on this subject carried out by the chairman of the Ad-Hoc Committee in 1989 are included in the Appendix II to the RT (26), but they are presented as a mere basis for further discussion and elaboration.

It is obvious that the various options which can be envisaged for the solution of these major issues of the verification regime would have a different impact on the problem of the protection of confidentiality.

4.1. Routine Inspections of Declared Facilities

This kind of inspection shall be conducted, pursuant to the last version of the Rolling Text, on the basis of facility attachments agreed on in advance between the Organization and the States Parties. The draft model for the facility attachments contained in Appendix II calls for the identification of the required degree of confidentiality for information provided during the elaboration of the agreement as well as for that obtained during the inspection (27).

Facility attachments could thus be an important means for preventing the loss of

confidential information by taking into account the specific features of each facility subject to inspection. For this reason, the idea of facility attachments has been strongly supported by the chemical industry.

The system of facility attachments has however the serious disadvantage of being too costly. A working paper recently presented by Sweden (28) includes the proposal to move away from the system of facility attachments while enlarging at the same time the scope of routine inspections in terms of facilities which can be subject to inspection. It must be noted here that the elimination of facility agreements would emphasize the need for a more detailed elaboration of the provisions regarding the protection of confidentiality in the articles of the Convention and in the Protocol on Inspection Procedures. An advantage of the absence of facility agreements as regards confidentiality would instead be that, as pointed out in the Swedish working paper, there would be no need to store detailed information regarding the facilities at the Technical Secretariat.

4.2. Ad Hoc Inspections

The concern about the above mentioned shortcomings of the verification regime has given rise to the idea of an additional system of ad hoc routine inspections. This idea has been elaborated in particular in some working papers presented by the Federal Republic of Germany (29) and in a subsequent working paper presented by the United Kingdom (30). Both proposals call for the inclusion into ad hoc inspections of chemicals listed in schedule 2 and 3. In a paper on ad hoc inspections the Conseil Européen des Fédérations de l'Industrie Chimique (CEFIC) has expressed the view that this kind of inspection should be limited to the verification of non-production of schedule 1 chemicals to prevent inter alia a possible loss of confidential information. However, the prevailing view among Western countries is that the inclusion of schedule 2 and 3 substances is necessary to ensure the effectiveness of ad hoc inspections. In any case it is in the interest of the chemical industry that ad hoc inspections be of as neutral (i.e. non-confrontational) a nature as possible. To this end the system of random selection of the facilities to be inspected proposed by the FRG appears to be more adequate than the quota systems contained in the UK proposal. Generally speaking, it must be stressed here that several reports on NTIs have pointed out that the establishment of a climate of cooperation between the inspection team and the representatives of the State and the facility inspected is fundamental for a rapid and effective solution of the problems relating to the protection of confidentiality. A system of selection of the facilities to be inspected which is not politically conditioned could help to create this climate.

In the above cited Swedish working paper a single unified system of verification in the chemical industry based on a qualitative approach is proposed. It appears to be highly intrusive as the nine production processes it identifies for the selection of the facilities to be inspected cover a very large portion of the chemical industry. Furthermore, the Swedish working paper proposes adopting a less restrictive interpretation of the term 'facility' using it to designate an entire plant site. While the acceptance of this broader definition of facility could increase the effectiveness of inspections, it would probably complicate the identification and establishment of procedures to protect confidential information.

4.3. Inspections on Request

The risk of a loss of confidential information is among the most significant reasons behind the reluctance of some States - particularly the non-aligned ones - to accept mandatory inspection on request.

The above cited paper containing the outcome of the 1989 open-ended consultations on "on-site inspections on challenge" supports the principle that each state party shall have the right to have this type of inspections conducted "anywhere, at any time and without delay" and that it shall be mandatory, without right of refusal. However, it foresees the right to "propose to the inspection team ways and means for the actual conduct of the inspection and also the protection of sensitive equipment or information not related to the Convention". The inspection team shall consider the proposals made "to the extent it deems them adequate for the conduct of its mission" (31). In addition, the requested state would have the right to propose arrangements alternative to a full and comprehensive access. In such case, it would yet be bound to make every effort "to reach agreement on the modalities for establishing the facts and thereby clarifying the doubts" (32). However, the paper leaves unsolved the very delicate question of whether the interlocutor of the requested state, in this negotiating process, would be the requesting state or the inspection team. Furthermore, no solution is given to the other crucial question of who - the inspection team, the Director-General or the requested state - should have the last word in case of persistent disagreement. Finally, the paper does not specify the rules for the handling and the dissemination of the report to be elaborated by the inspection team, which could contain confidential information.

To overcome the resistance to the concept of mandatory inspections on request many attempts have been made to identify procedures aimed at easing the confrontational aspects of inspections on request, by giving the inspected State the right to play a role in establishing inspection procedures. In particular, the concept of 'managed access' and 'alternative measures' have been developed. The first concept has also been included in the part of the Protocol on Inspection Procedures regarding challenge inspections (33). The UK has proposed a system of random selective access with particular regard to sites of importance to national security (34). On the basis of the results of four NTIs carried out at military facilities with the adoption of this system the UK has come to the conclusion that even sites especially sensitive for national security - where, for instance, nuclear weapons are stored - can be effectively inspected while avoiding at the same time the disclosure of confidential information. Other NTIs (35) have pointed out that modern technology offers a wide spectrum of instruments which can permit inspection in ammunition depots without compromising sensitive information.

A methodology different from, but possibly complementary to managed access is the step-by-step approach proposed by the former GDR (36). According to this methodology, inspections on request would be conducted in a series of increasingly intrusive stages. The passage from one stage to another would not be automatic, but dependent on the results of the less intrusive stages. The step-by-step methodology was also put to test by the United States in two recent NTIs (37).

It must be stressed that both managed access and the layered inspection methodology are only conceivable on the basis of inspection mandates and inspection plans which allow inspectors a certain degree of flexibility.

The other option is to give the requested State the right to propose alternative

arrangements to demonstrate compliance which would exclude access to the site or only permit a limited access to it. The crucial problem in this case would be the procedures regulating the negotiation process between the inspectors and the representatives of the requested State Party. A difficult problem is that of who should be entitled to take the final decision if negotiations came to no definitive result. In any case, it seems necessary that, as suggested by Sweden, the inspection team in all circumstances be brought to the site.

More recently, Australia, Britain, Japan and the United States proposed in a joint paper (38) that inspections on request be carried out on the basis of a previous agreement between the requested state and the international inspectors on the definition of the perimeter of the site to be inspected. The key element - indeed, the most criticized one - of the proposal is that the last decision on the definition of the perimeter could not be made without the approval of the inspected state.

Another delicate and controversial issue relating to inspections on request is the presence and role of an observer of the requesting State Party. In fact, some non-aligned countries continue to oppose the right of the requesting State to send an observer. The Protocol on Inspection Procedures foresees this right, but does not specify the activities of the observer during the inspection (39). Indeed, the presence of an observer seems to be necessary both as a confidence-building measure for the requesting State and for the purpose of minimizing the possibility that the requesting State would contest the results of the inspection. However, the Protocol on Inspection Procedures should clearly define and delimit the rights of observers, especially as regards the stages of the inspection in which they may participate, the areas to which they may have access and the interlocutors they may address. Useful suggestions on this matter are contained in some NTIs (40).

NOTES

- 1) "Study on the Role of the United Nations in the Field of Verification", UN Department for Disarmament Affairs, New York, 1991, pp.50-51; 67-68.
- 2) CD 901.
- 3) CD 1108, p.76.
- 4) ibidem.
- 5) ibidem, p.77.
- 6) ibidem.
- 7) ibidem, p.78.
- 8) ibidem.
- 9) ibidem.
- 10) ibidem, pp.210-211.
- 11) ibidem, p.43.
- 12) ibidem, p.79.
- 13) ibidem, pp.137-139.
- 14) ibidem, p.79.
- 15) ibidem, p.162.
- 16) ibidem, p.80.
- 17) Art. VIII §16 (h) assigns the Conference of States Parties the power to "establish such subsidiary organs as it finds necessary for the exercise of its functions in accordance with this Convention" (ibidem, p.39).
- 18) ibidem, p.54.
- 19) ibidem, pp.40-41.
- 20) CD 901, p.12.
- 21) CD 1108, pp.159-167.
- 22) ibidem, p.34.
- 23) CD 901, pp.12-14.
- 24) CD 1108, pp.159-167.
- 25) ibidem, p.45.
- 26) ibidem, pp.212-215.
- 27) ibidem, p.186; p.189.
- 28) CD 1053.
- 29) CD 627; CD 791; CD 869; CD 984.
- 30) CD 909.
- 31) CD 1108, p.213.
- 32) ibidem.
- 33) CD 1108, pp.163-164.
- 34) CD 1012; CD 1056; CD 1080.
- 35) CD 975; CD 1018; CD 1063.
- 36) CD 996. See also CD 1018.
- 37) CD 1100; CD 1107.
- 38) CD/CW/WP.351.
- 39) CD 1108, p. 165.
- 40) See in particular CD 1018; CD 1029; CD 1052; CD 1056; CD 1063; CD 1102.