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Title: Article XVI, XVII, XVIII, XIX and XXIII: Status of the Annexes and Appendices, Signature, Ratification, Accession and Authentic Texts

Project: Bradford Project on Strengthening the Biological and Toxin Weapons Convention (BTWC)

Publication year: 1999

BTWC Evaluation Papers: No. 3

Series Editor(s): Dando, M.R. and Whitby, S.

Publisher: University of Bradford (<http://www.brad.ac.uk>)

Publisher's repository: <http://bradscholars.ac.uk:8080/dspace>

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**ARTICLES XVI, XVII, XVIII, XIX AND XXIII:
STATUS OF THE ANNEXES AND APPENDICES,
SIGNATURE, RATIFICATION, ACCESSION AND AUTHENTIC TEXTS**

by Nicholas A Sims[†]

Introduction

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

2. In Evaluation Paper No 1 it was concluded¹ that *"the majority of the Articles in the draft Protocol have now reached the stage when they have had multiple readings and are unlikely to change significantly during the coming months as the negotiations enter the end-game. It is therefore timely to commence the production of a series of Evaluation Papers which will consider Article by Article the current state of each Article of the Protocol."* This Evaluation Paper continues this series by considering Article XVI *Status of the Annexes and Appendices*, Article XVII *Signature*, Article XVIII *Ratification*, Article XIX *Accession* on which the AHG has made good progress with the current rolling text containing no square brackets and Article XXIII *Authentic Texts* for which the current rolling text contains two pairs of square brackets.

ARTICLE XVI STATUS OF THE ANNEXES AND APPENDICES

3. In July 1999, the text² for Article XVII was unchanged from the earlier version and was as follows:

ARTICLE XVI

STATUS OF THE ANNEXES AND APPENDICES

*The Annexes and Appendices to this Protocol form an integral part of the Protocol.
Any reference to this Protocol includes the Annexes and Appendices.*

The ~~striketrough~~ version of Article XVI provided³ by the FOC on Legal Issues for further consideration is identical to that in the draft Protocol as no changes are proposed.

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

²United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part I), 30 July 1999, Geneva.

Evaluation

4. This provision is necessary to define the scope of the obligations which the eventual States Parties to the Protocol will be taking upon themselves. It is similar to the provisions in Article XVII of the Chemical Weapons Convention (CWC)⁴:

ARTICLE XVII

STATUS OF THE ANNEXES

The Annexes form an integral part of this Convention. Any reference to this Convention includes the Annexes.

and to those in Article X of the Comprehensive Test Ban Treaty (CTBT)⁵:

ARTICLE X

STATUS OF THE PROTOCOL AND THE ANNEXES

The Annexes to this Treaty, the Protocol and the annexes to the Protocol form an integral part of the Treaty. Any reference to this Treaty includes the Annexes to this Treaty, the Protocol and the Annexes to the Protocol.

5. Article 17.1 of the 1999 Vienna Convention on the Law of Treaties⁶ provides that:

Without prejudice to Articles 19 to 23 [which concern reservations], the consent of a State to be bound by part of a treaty is effective only if the treaty so permits or the other Contracting Parties so agree.

By defining the Annexes and Appendices as an *integral part* of the Protocol, Article XVI precludes the possibility of any State claiming to be bound by the Articles of the Protocol but not by its Annexes and Appendices, or selecting from among the Annexes and Appendices those by which it is willing to be bound and those by which it is not.

6. The second sentence, *Any reference to this Protocol includes the Annexes and Appendices*, confirms their status. In the absence of any provision allowing a State to choose to be bound by only part of the Protocol -- the eventuality envisaged in the *only if the treaty so permits* condition of the Vienna Convention on the Law of Treaties extract above -- the

³United Nations, *Proposals for further consideration by the Friend of the Chair on Legal Issues*, BWC/AD HOC GROUP/FOC/22, 28 July 1999 in Annex IV of *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part II), 4 August 1999, Geneva.

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

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

⁶*Vienna Convention on the Law of Treaties*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH408.txt>

intention is clear. The principal of *pacta sunt servanda*, expressed in Article 26 of the Vienna Convention as:

ARTICLE 26

Pacta sunt servanda

Every treaty in force is binding upon the parties to it and must be performed by them in good faith.

applies to the obligations arising from the Annexes and Appendices equally with those arising from the Articles of the Protocol.

7. This Article makes the important point that the Annexes and Appendices do not differ from the Articles of the Protocol in respect of legal effect. The scope of the obligations assumed by the States Parties extends fully to the Annexes and the Appendices. They differ only in being more detailed than the Articles of the Protocol; and they take the form they do only for convenience, not because they are in any way less obligatory.

8. Article XVI itself is not contentious. It does, however, in our view risk being undermined by Article XXI *Reservations* unless that Article prohibits reservations to the Annexes and Appendices equally with reservations to Articles of the Protocol.⁷

Text for Article XVI

9. The current text for the Protocol contains no square brackets and no further changes are suggested.

ARTICLE XVII SIGNATURE

10. In July 1999, the text⁸ for Article XVII was unchanged from the earlier version and was as follows:

ARTICLE XVII

SIGNATURE

This Protocol shall be open for signature to all States Parties to the Biological and Toxin Weapons Convention of 1972, before this Protocol enters into force.

The ~~striketrough~~ version of Article XVII provided⁹ by the FOC on Legal Issues for further consideration proposes a streamlining of the reference to the Convention as follows:

⁷Graham S. Pearson & Nicholas A. Sims, *Article XXI: Reservations*, Evaluation Paper No. 6, University of Bradford, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

⁸United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part I), 30 July 1999, Geneva.

⁹United Nations, *Proposals for further consideration by the Friend of the Chair on Legal Issues*, BWC/AD HOC GROUP/FOC/22, 28 July 1999 in Annex IV of *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological*

ARTICLE XVII

SIGNATURE

This Protocol shall be open for signature to all States Parties to the ~~Biological and Toxin Weapons Convention of 1972~~ Convention, before this Protocol enters into force.

Evaluation

11. This provision corresponds to the standard clause on signature found in Article XIV.1 (first sentence) of the BTWC¹⁰:

This Convention shall be open to all States for signature.

to Article XVIII of the Chemical Weapons Convention (CWC):

This Convention shall be open for signature for all States before its entry into force.

and to Article XI of the Comprehensive Test Ban Treaty (CTBT)¹¹ :

This Treaty shall be open to all States for signature before its entry into force.

12. It affirms the universality of participation sought for the Protocol -- *all States* -- but locates this universality within the population of States Parties to the BTWC: a logically necessary limitation. Those States, currently almost 50 in all, for which the BTWC is not yet in force would not be eligible to sign the Protocol even if they wanted to. This category includes the remaining current 18 Signatory States¹² outstanding from 1972 - 73. They, as much as the approximately 30 non-signatories, would not be eligible until they had ratified the BTWC.

Text for Article XVII

13. The current text for the Protocol contains no square brackets and the proposals made by the Friend of the Chair for streamlining the reference to the Convention are endorsed. No further changes are suggested.

ARTICLE XVIII RATIFICATION

(Biological) and Toxin Weapons and on their Destruction, BWC/AD HOC GROUP/46 (Part II), 4 August 1999, Geneva.

¹⁰United Nations, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, General Assembly Resolution 2826 (XXVI), 16 December 1971.

¹¹*Comprehensive Nuclear-Test-Ban Treaty*. Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

¹²United Nations, *List of States Parties and List of Signatories to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction as at July 1999*, BWC/AD HOC GROUP/INF. 20, 20 July 1999.

14. In July 1999, the text¹³ for Article XVIII was unchanged from the earlier version and was as follows:

ARTICLE XVIII

RATIFICATION

This Protocol shall be subject to ratification by States Signatories according to their respective constitutional processes.

The ~~strike through~~ version of Article XXII provided¹⁴ by the FOC on Legal Issues for further consideration is identical to that in the draft Protocol as no changes are proposed.

Evaluation

15. This provision corresponds to the standard clause on ratification found in the first sentence of Article XIV.2 of the BTWC¹⁵ which states:

ARTICLE XIV

2. This Convention shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the Union of Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America, which are hereby designated the Depositary Governments.

to Article XIX of the CWC¹⁶ which states:

ARTICLE XIX

RATIFICATION

This Convention shall be subject to ratification by States Signatories according to their respective constitutional processes.

and to Article XII of the CTBT¹⁷ which states:

¹³United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part I), 30 July 1999, Geneva.

¹⁴United Nations, *Proposals for further consideration by the Friend of the Chair on Legal Issues*, BWC/AD HOC GROUP/FOC/22, 28 July 1999 in Annex IV of *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part II), 4 August 1999, Geneva.

¹⁵United Nations, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, General Assembly Resolution 2826 (XXVI), 16 December 1971.

¹⁶Organization for the Prohibition of Chemical Weapons, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Available on the web at <http://www.opcw.nl>

¹⁷*Comprehensive Nuclear-Test-Ban Treaty*. Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

ARTICLE XII

RATIFICATION

This Convention shall be subject to ratification by States Signatories according to their respective constitutional processes.

16. The place of deposit of ratification instruments is not specified, as it is in Article XIV.2 of the BTWC, because a separate Article XXII addresses the functions of Depositaries -- as is the case in the CWC and the CTBT. It is apparent from Article XXII that the place of deposit of ratification instruments will be New York if the UN Secretary-General is to be Depositary, or Moscow, London and Washington, D.C. if Russia, UK and US are to be Depositaries.

17. The *respective constitutional processes* of States Signatories to the Protocol will vary greatly, from those in which ratification is simply a government's executive endorsement of its own signature to those in which scrutiny of the ratification proposal by parliamentary or congressional committees is involved. In some cases a formal recommendation by a legislative organ -- such as the Advice and Consent procedure of the United States Senate -- or even passage of legislation is required before a government is constitutionally empowered to ratify. There may be a danger of ratification processes being misused in some legislatures to attach unilateral conditions, detrimental to the Protocol, where neither formal reservation¹⁸ nor renegotiation is possible. It is difficult, however, to see how any new language in this Article could guard effectively against that danger, of which States Signatories will need to be aware when embarking on their respective constitutional processes for ratification.

Text for Article XVIII

18. The current text for the Protocol contains no square brackets and no further changes are suggested.

ARTICLE XIX ACCESSION

19. In July 1999, the text¹⁹ for Article XIX was unchanged from the earlier version and was as follows:

ARTICLE XIX

ACCESSION

¹⁸Graham S. Pearson & Nicholas A. Sims, *Article XXI: Reservations*, Evaluation Paper No. 6, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

¹⁹United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part I), 30 July 1999, Geneva.

Any State Party to the Biological and Toxin Weapons Convention of 1972 which does not sign this Protocol before its entry into force may accede to it at any time thereafter.

The ~~striketrough~~ version of Article XVII provided²⁰ by the FOC on Legal Issues for further consideration proposes a streamlining of the reference to the Convention as follows:

ARTICLE XIX

ACCESSION

*Any State Party to the ~~Biological and Toxin Weapons Convention of 1972~~ **Convention** which does not sign this Protocol before its entry into force may accede to it at any time thereafter.*

Evaluation

20. This provision corresponds to the standard clauses on accession found in the second sentence of Article XIV.1 of the BTWC²¹:

Any State which does not sign the Convention before its entry into force in accordance with paragraph 3 of this Article may accede to it at any time thereafter.

(Paragraph 3 of Article XIV of the BTWC simply states the requirements for entry into force of the Convention.)

in Article XX of the CWC²²:

ARTICLE XX

ACCESSION

Any State which does not sign this Convention before its entry into force may accede to it at any time thereafter.

and in Article XIII of the CTBT²³:

²⁰United Nations, *Proposals for further consideration by the Friend of the Chair on Legal Issues*, BWC/AD HOC GROUP/FOC/22, 28 July 1999 in Annex IV of *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part II), 4 August 1999, Geneva.

²¹United Nations, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, General Assembly Resolution 2826 (XXVI), 16 December 1971.

²²Organization for the Prohibition of Chemical Weapons, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Available on the web at <http://www.opcw.nl>

²³*Comprehensive Nuclear-Test-Ban Treaty*. Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

ARTICLE XIII

ACCESSION

Any State which does not sign this Treaty before its entry into force may accede to it at any time thereafter.

21. Accession conflates the stages of signature and ratification into a single act, and will only occur after the Protocol has entered into force for its original States Parties²⁴.

22. Like signature under Article XVII, accession would not be open to those States, almost 50 in all, for which the BTWC is not yet in force, even if they wanted to accede. This is a logically necessary limitation given the relationship of the Protocol to the BTWC.

23. As with ratification under Article XVIII, accession would involve the deposit of a legal instrument binding the acceding State. The place of deposit will be determined by the outcome of the negotiation on Article XXII²⁵.

Text for Article XIX

24. The current text for the Protocol contains no square brackets and the proposals made by the Friend of the Chair for streamlining the reference to the Convention are endorsed. No further changes are suggested.

ARTICLE XXIII AUTHENTIC TEXTS

25. In July 1999, the text²⁶ for Article XXIII was unchanged from the earlier version and was as follows:

ARTICLE XXIII

AUTHENTIC TEXTS

1. This Protocol, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the [Secretary-General of the United Nations] [Governments of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America].

2. IN WITNESS THEREOF the undersigned, being duly authorized to that effect, have signed this Protocol.

Done at ... on

²⁴Graham S. Pearson & Nicholas A. Sims, *Article XX: Entry into Force*, Evaluation Paper No. 5, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

²⁵Graham S. Pearson & Nicholas A. Sims, *Article XXII: Depositary/ies*, Evaluation Paper No. 7, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

²⁶United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part I), 30 July 1999, Geneva.

The ~~striketrough~~ version of Article XXII provided²⁷ by the FOC on Legal Issues for further consideration is identical to that in the draft Protocol as no changes are proposed.

Evaluation

26. This provision corresponds to Article XXIV of the CWC:

ARTICLE XXIV

AUTHENTIC TEXTS

1. This Convention, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

2. IN WITNESS WHEREOF the undersigned, being duly authorized to that effect, have signed this Convention.

Done at Paris on the thirteenth day of January, one thousand nine hundred and ninety-three.

and to Article XVII of the CTBT:

ARTICLE XVII

AUTHENTIC TEXTS

1. This Treaty, of which the Arabic, Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations.

27. The equal authenticity of the text of the BTWC in each of the official languages of the United Nations -- then only five -- was affirmed in the first sentence of its Article XV²⁸:

ARTICLE XV

²⁷United Nations, *Proposals for further consideration by the Friend of the Chair on Legal Issues*, BWC/AD HOC GROUP/FOC/22, 28 July 1999 in Annex IV of *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part II), 4 August 1999, Geneva.

²⁸This is as stated in the source referenced although it is noted that other versions of the BTWC have a different sequence - English, Russian, French, Spanish and Chinese - for the languages listed. United Nations, *Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction*, General Assembly Resolution 2826 (XXVI), 16 December 1971.

This Convention, the Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited in the archives of the Depository Governments.

Arabic had not yet been added as the sixth additional language when the BTWC was concluded. It was added in 1977 by resolutions of the United Nations General Assembly, Security Council and Economic and Social Council. Its subsequent use in BTWC fora such as Review Conferences should minimise any problems arising from the formal disparity between five equally authentic languages for the Convention and six for its Protocol.

Strike-through Text for Article XXIII

28. The current text for the Protocol only contains square brackets around the depository option. As we have argued in our Evaluation Paper *Article XII: Depository/ies*²⁹ that this should be the Secretary-General of the United Nations, our view is that Article XXIII should have the square brackets removed as shown in the strike-through version of Article XXIII below so as to produce clean text:

ARTICLE XXIII

AUTHENTIC TEXTS

1. This Protocol, the Arabic, Chinese, English, French, Russian and Spanish texts of which are equally authentic, shall be deposited with the ~~†~~Secretary-General of the United Nations ~~†~~~~[Governments of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America].~~

2. IN WITNESS THEREOF the undersigned, being duly authorized to that effect, have signed this Protocol.

Done at ... on

²⁹Graham S. Pearson & Nicholas A. Sims, *Article XXII: Depository/ies*, Evaluation Paper No. 7, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>