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## ARTICLE XXII: DEPOSITARY/IES

by Graham S. Pearson\* & Nicholas A Sims†

### Introduction

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

2. In Evaluation Paper No 1 it was concluded<sup>1</sup> 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 XXII *Depositary/ies* on which the AHG has made good progress with the current rolling text containing six sets of square brackets providing for two alternative options for the depositary/ies.

### Article XXII

3. In July 1999, the text<sup>2</sup> for Article XXII was unchanged from its earlier version and was as follows:

#### ARTICLE XXII

#### DEPOSITARY/IES

*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] [is] [are] hereby designated as the [Depositary] [Depositaries] of this Protocol and shall, inter alia:*

*(a) Promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Protocol, and of the receipt of other notices;*

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<sup>1</sup>Graham 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>

<sup>2</sup>United 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.

*(b) Transmit duly certified copies of this Protocol to the governments of all signatory and acceding States; and*

*(c) Register this Protocol pursuant to Article 102 of the Charter of the United Nations.*

The ~~striketrough~~ version of Article XXII provided<sup>3</sup> by the FOC on Legal Issues for further consideration is identical to that in the draft Protocol as no changes are proposed.

## **Evaluation**

4. The square brackets show that designation of a Depositary or Depositaries for the Protocol is still under debate: the listing of formal depositary functions is not. That listing follows the pattern of the BTWC<sup>4</sup> which states:

in Article XIV that

*5. The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or of accession and the date of entry into force of this Convention, and of the receipt of other notices.*

*6. This Convention shall be registered by the Depositary Governments pursuant to Article 102 of the Charter of the United Nations.*

and in the second sentence of Article XV that:

*Duly certified copies of the Convention shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding States.*

of Article XXIII in the Chemical Weapons Convention (CWC)<sup>5</sup> which states:

### *ARTICLE XXIII*

#### *DEPOSITARY*

*The Secretary-General of the United Nations is hereby designated as the Depositary of this Convention and shall, inter alia:*

*(a) Promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession*

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<sup>3</sup>United 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.

<sup>4</sup>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.

<sup>5</sup>Organization for the Prohibition of Chemical Weapons, *Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction*, Available on the web at <http://www.opcw.nl>

*and the date of the entry into force of this Convention, and of the receipt of other notices;*

*(b) Transmit duly certified copies of this Convention to the Governments of all signatory and acceding States; and*

*(c) Register this Convention pursuant to Article 102 of the Charter of the United Nations.*

and of Article XVI in the Comprehensive Test Ban Treaty (CTBT)<sup>6</sup> which states:

#### ARTICLE XVI

#### DEPOSITARY

*1. The Secretary-General of the United Nations is hereby designated as the Depositary of this Treaty and shall receive signatures, instruments of ratification and instruments of accession.*

*2. The Depositary shall promptly inform all States Signatories and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Treaty and of any amendments and changes thereto, and the receipt of other notices.*

*3. The Depositary shall send duly certified copies of this Treaty to the Governments of the States Signatories and acceding States.*

*4. This Treaty shall be registered by the Depositary pursuant to Article 102 of the Charter of the United Nations.*

The depositary functions in Article XXII of the draft Protocol are thus not in contention.

**5. The designation of Depositary.** The current draft Protocol contains language for two alternative depositaries: the Secretary-General of the United Nations; or the Governments of the Russian Federation, United Kingdom and United States.

6. Insofar as the designation of the three named governments as Depositaries is concerned, it can be argued that because they are the three Depositary Governments for the BTWC, it would be illogical to have a different Depositary for its Protocol, especially given the close relationship between the two instruments in respect of the review process foreseen under Article XIII of the Protocol. Moreover, the three governments have special responsibilities for the operation of the contingency mechanism addressing compliance concerns under Article V which were conferred upon the Depositaries by the Third Review Conference<sup>7</sup> in 1991 and put into practice for the first time when the Consultative Meeting of States Parties to the BTWC addressed the *Thrips palmi* question in 1997 at the request of Cuba<sup>8</sup>. It can,

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<sup>6</sup>*Comprehensive Nuclear-Test-Ban Treaty.* Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

<sup>7</sup>United Nations, *The Third Review Conference of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, Final Document, Geneva, 9–27 September 1991, BWC/CONF.III/23, Geneva 1992, Part II, page 15-16.

<sup>8</sup>Graham S. Pearson, *Cuban Allegation of BW Attack: The Final Report*, The ASA Newsletter, 98-2, 30 April 1998, p.28.

however, be argued that this contingency mechanism is -- on the assumption that all BTWC States Parties also become parties to the Protocol -- but an interim arrangement pending the entry into force of the Protocol -- as it is noted that the outcome of the Consultative Meeting specifically stated<sup>9</sup> that *"the Bureau agreed that the experience of conducting this process and consultation had shown the importance of establishing as soon as possible an effective Protocol to strengthen the Convention which is being negotiated in the Ad Hoc Group."*

7. It could also be argued that the Depositaries have special responsibilities for bringing to a successful conclusion the trilateral process<sup>10</sup> which they launched in Moscow on 14 September 1992, although their obligations towards the other States Parties to the BTWC are less clear in respect of this process than when operating the Convention's own machinery, as in the 1997 Consultative Meeting, for the handling of compliance concerns.

8. As for the designation of the UN Secretary-General as Depositary, it can be argued that the precedents of the 1993 CWC, the 1996 CTBT and the 1997 Anti-Personnel Mines Convention<sup>11</sup> are more relevant to a protocol drafted in the late 1990s than the pattern of 1963 to 1972. Indeed, if we examine the pattern of depositaries in some of the treaties that opened for signature in the 1960s and early 1970s, it can be seen that the designation of the three named Governments was not universal and ceased after the 1972 BTWC.

<b>Date</b>	<b>Treaty</b>	<b>Article</b>	<b>Depositary</b>	<b>Depositary ratification for EIF?</b>
18 Apr 1961	Vienna Convention on Diplomatic Relations <sup>12</sup>	49	UN S-G	No
24 Apr 1963	Vienna Convention on Consular Relations <sup>13</sup>	75	UN S-G	No
5 Aug 1963	Limited Test Ban Treaty <sup>14</sup>	III.2	UK, US and Soviet Union	Yes
7 Mar 1966	Elimination of all Forms of Racial Discrimination <sup>15</sup>	19.1	UN S-G	No
27 Jan 1967	Peaceful Uses of Outer Space <sup>16</sup>	XIV.2	UK, US and Soviet Union	Yes

<sup>9</sup>United Kingdom Permanent Representation to the Conference on Disarmament, Letter to All States Parties to the Biological and Toxin Weapons Convention dated 15 December 1997, Geneva.

<sup>10</sup>Richard Boucher, US Department of State, Spokesman, *Joint US/UK/Russian Statement on Biological Weapons*, 14 September 1992.

<sup>11</sup>*Convention on the Prohibition of the Use, Stockpiling, Production and Transfer or Anti-Personnel Mines and on Their Destruction*, 18 September 1997. Available on the web at <http://www.mines.gc.ca/english/documents/treaty.html>

<sup>12</sup>*Vienna Convention on Diplomatic Relations and Optional Protocols*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH408.txt>

<sup>13</sup>*Vienna Convention on Consular Relations and Optional Protocol*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH444.txt>

<sup>14</sup>*Treaty Banning Nuclear Weapons Tests in the Atmosphere, in Outer Space and under Water*. Known as the Limited Test Ban Treaty or the Partial Test Ban Treaty. Available at <http://www.acda.gov/treaties/itbt1.htm#2>

<sup>15</sup>*International Convention on the Elimination of All Forms of Racial Discrimination*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH490.txt>

<sup>16</sup>*Treaty on the Principles Governing the Activities of States in the Exploration and Use of Outer Space, including the Moon and Other Celestial Bodies*. Available at <http://www.acda.gov/treaties/space1.htm>

Date	Treaty	Article	Depository	Depository ratification for EIF?
22 Apr 1968	Rescue and Return of Astronauts and Objects <sup>17</sup>	7.2	UK, US and Soviet Union	Yes
1 Jul 1968	Nuclear Non-Proliferation Treaty <sup>18</sup>	IX.2	UK, US and Soviet Union	Yes
23 May 1969	Vienna Convention on the Law of Treaties <sup>19</sup>	82	UN S-G	No
16 Dec 1970	Suppression of Unlawful Seizure of Aircraft <sup>20</sup>	13.2	UK, US and Soviet Union	No
11 Feb 1971	Sea-Bed Treaty <sup>21</sup>	X.2	UK, US and Soviet Union	Yes
23 Sept 1971	Suppression of Unlawful Acts Against the Safety of Civil Aviation <sup>22</sup>	15.3	UK, US and Soviet Union	No
29 Mar 1972	International Liability for Damage caused by Space Objects <sup>23</sup>	XXIV. 2	UK, US and Soviet Union	No
10 Apr 1972	Biological and Toxin Weapons Convention <sup>24</sup>	XIV.2	UK, US and Soviet Union	Yes
30 Nov 1973	Suppression and Punishment of Apartheid <sup>25</sup>	14.1	UN S-G	No
14 Dec 1973	Prevention and Punishment of Crimes against Internationally Protected Persons <sup>26</sup>	15	UN S-G	No
14 Jan 1975	Registration of Objects Launched into Outer Space <sup>27</sup>	VIII.2	UN S-G	No

<sup>17</sup>*Agreement on the Rescue of Astronauts, the Return of Astronauts and the Return of Objects Launched into Outer Space*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH523.txt>

<sup>18</sup>United Nations, *Treaty on the Non-Proliferation of Nuclear Weapons*, Treaty Series, Vol. 729, I. No. 10485, 168-175, 1970.

<sup>19</sup>*Vienna Convention on the Law of Treaties*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH538.txt>

<sup>20</sup>*Convention on the Suppression of Unlawful Seizure of Aircraft*, The Hague, 16 December 1970.

<sup>21</sup>*Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof*. Available at <http://www.acda.gov/treaties/seabed1.htm>

<sup>22</sup>*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH586.txt>

<sup>23</sup>*Convention on International Liability for Damage caused by Space Objects*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH595.txt>

<sup>24</sup>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.

<sup>25</sup>*International Convention on the Suppression and Punishment of the International Crime of Apartheid*, 30 November 1973, New York.

<sup>26</sup>*Convention on the Prevention and Punishment of Crimes Against Internationally Protected Persons, including Diplomatic Agents*, 14 December 1973, New York.

<sup>27</sup>*Convention on Registration of Objects Launched into Outer Space*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH653.txt>

Date	Treaty	Article	Depositary	Depositary ratification for EIF?
18 May 1977	Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques <sup>28</sup>	IX.2	UN S-G	No

9. As we have noted in our Evaluation Paper on Article XX *Entry into Force* <sup>29</sup>, there is a clear transition during the 1960s and 1970s away from the triple-depositary mechanism and from the requirement for prior deposit of instruments by the three states to a system in which the UN Secretary-General is the Depositary and deposit by a varying number of States is required for entry into force. In this respect, there is particular interest that although the 1967 Peaceful Uses of Outer Space Convention requires the deposit of instruments of ratification by the three Depositaries for entry into force, the two subsequent associated Conventions -- the 1972 International Liability for Damage caused by Space Objects Convention and the 1975 Registration of Objects Launched into Outer Space Convention -- do not, with the former having the triple-depositary mechanism and the latter having the UN Secretary-General as Depositary. Similarly, this same trend is also shown by the much more recent 1996 CTBT, which can be regarded as a successor to the LTBT, and which has the Secretary-General of the UN as the Depositary as do the CWC and the Anti-Personnel Mines Treaty.

10. The use of the triple-depositary mechanism in nine treaties, of which the BTWC was the last, can be seen as a temporary device limited to alleviating the adverse impact of East-West problems on participation in multilateral treaties. It was designed to get round problems of non-recognition or absence of diplomatic relations by offering a choice among the three Depositary Governments with which to deposit instruments of ratification and accession. It lost much of its usefulness once the Federal Republic of Germany and the German Democratic Republic were admitted simultaneously to membership of the United Nations in 1973, and of the Conference of the Committee on Disarmament in 1975, with corresponding extension of recognition and diplomatic relations. Although the German case is only one of several which the triple-depositary mechanism was designed to address, it is evident that no treaty has chosen to make use of that mechanism since the BTWC in 1972. The use of the mechanism in the Protocol would thus be anachronistic: it cannot offer the prospect of increasing the overall roster of States Parties to the Protocol by overcoming East-West problems, as it could -- if only marginally and for a short time -- for the BTWC in 1972. The UN Secretary-General is thus the 'natural' choice of Depositary and does not require special justification.

11. There are clearly further arguments that can be considered. For example, it could be argued that the Depositary Governments are vital to the functioning of the BTWC and that it would make for an awkward, and unnecessary, dislocation if they were not also to be designated as Depositaries for the Protocol. However, it should not be overlooked that the triple-depositary mechanism in some respects is cumbersome. It has not been outstandingly effective in providing reliably definitive lists of States Parties and of Signatory States. Such lists have fortunately been produced periodically by the United Nations, most recently by the

<sup>28</sup>*Convention on Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH700.txt>

<sup>29</sup>Graham S. Pearson & Nicholas A. Sims, *Article XX: Entry into Force*, Evaluation Paper No. 5, University of Bradford, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

Secretariat for the Ad Hoc Group<sup>30</sup>, but the requirement to respect the Depositaries' position as the only authoritative source of such information has been a complicating factor.

12. The words *inter alia* preceding (a), (b) and (c) in Article XXII of the draft Protocol show that the formal responsibilities specified in those three sub-paragraphs do not exhaust the functions of the Depositary/ies for the Protocol. They constitute a permissive provision and suggest that the assumption of further functions is clearly envisaged. One of the most important additional functions which needs to be performed for the Protocol is **recruitment**. This includes, in particular, the encouragement of ratification by original signatories so as to bring the Protocol into force, and thereafter the promotion of universality, although at that stage the future BTWC Protocol Organization will have a major role to play as noted below. It is worth considering the potential role of the Depositary/ies in encouraging wider participation in the Protocol, before and after entry into force, as this is not a responsibility which the Protocol formally allocates to anyone.

13. Efforts at recruitment to the BTWC itself have been spasmodic at best, and not confined to the Depositary Governments. Australia was particularly active in encouraging wider BTWC participation in the Asia-Pacific region before the Third Review Conference in 1991, and the European Union countries (including one of the Depositaries) likewise undertook demarches, particularly towards African non-parties, at that time. Non-governmental organizations have also sought to encourage non-parties to ratify or accede to the BTWC; and successive Review Conferences have attempted to encourage the process of widening participation by issuing general exhortations. Nevertheless almost 50 states remain outside, so the combined effect of all these efforts has thus far fallen short of universality.

14. However, it needs to be recognised that once the Protocol has entered into force then the BTWC Organization can, under the guidance of its Conference of States Parties, be expected to undertake many of the promotional functions that encourage universality. The Organisation for the Prohibition of Chemical Weapons (OPCW) has been energetic in recruiting new States Parties to the CWC and the OPCW report<sup>31</sup> on the implementation of the CWC in 1998 noted that

*the number of States parties, which had increased from 87 at EIF to 105 on 31 December 1997, grew further to 121 exactly one year later. This rapid rate of continuing accession to the Convention (16 States parties, or 15%, in the past year), unprecedented in the history of multilateral disarmament agreements, reflected the growing recognition by the international community of the urgency of the task of the global elimination of chemical weapons and of the pivotal role which the OPCW plays in this endeavour....The Organisation's efforts to achieve universality of the Convention continued at various levels.*

It can therefore be expected that the future BTWC Organization will be equally energetic in pursuing universality for the Protocol. This will be particularly important for the BTWC Protocol because of the importance of minimizing the extent and duration of a two-tier

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<sup>30</sup>The latest such listing is United 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*, BWC/AD HOC GROUP/INF.20, 20 July 1999

<sup>31</sup>Organization for the Prohibition of Chemical Weapons, *Report of the Organization on the Implementation of the Convention (1 January - 31 December 1998)*, Conference of States Parties, Fourth Session, 28 June - 2 July 1999, C-IV/5, 2 July 1999.

structure of obligation as between those BTWC States Parties that accept the Protocol and those which do not.

15. As we conclude in our Evaluation Paper on Article XX *Entry into Force*<sup>32</sup> that entry into force should not require the prior deposit of the instruments of ratification of the three Depositaries of the BTWC, the option of having the three BTWC Depositaries being designated as Depositaries for the Protocol **without** requiring the three Depositaries to deposit their instruments of ratification prior to entry into force of the Protocol could also be considered; such an arrangement would effectively follow the precedent of the 1971 Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation<sup>33</sup> and the 1972 Convention on International Liability for Damage caused by Space Objects<sup>34</sup>. However, such an option appears to offer no advantages and is therefore not considered further.

16. We conclude that the case for the three Depositaries of the BTWC also being the Depositaries of the Protocol is not compelling and therefore based on the overall argument we recommend that the Depositary in Article XXII should be the UN Secretary-General in line with prevailing practice in the multilateral disarmament agreements of the 1990s.

### **Strike-through text for Article XXII**

17. Our view is that Article XXII should be based on the UN Secretary-General as the Depositary as follows:

#### *ARTICLE XXII*

#### *DEPOSITARY/IES*

*The ~~Secretary-General of the United Nations~~ ~~Government of the Russian Federation, the United Kingdom of Great Britain and Northern Ireland and the United States of America~~ ~~is~~ ~~are~~ hereby designated as the ~~Depositary~~ ~~Depositaries~~ of this Protocol and shall, inter alia:*

*(a) Promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or accession and the date of the entry into force of this Protocol, and of the receipt of other notices;*

*(b) Transmit duly certified copies of this Protocol to the governments of all signatory and acceding States; and*

*(c) Register this Protocol pursuant to Article 102 of the Charter of the United Nations.*

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<sup>32</sup>Graham S. Pearson & Nicholas A. Sims, *Article XX: Entry into Force*, Evaluation Paper No. 5, University of Bradford, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

<sup>33</sup>*Convention for the Suppression of Unlawful Acts Against the Safety of Civil Aviation*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH586.txt>

<sup>34</sup>*Convention on International Liability for Damage caused by Space Objects*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH595.txt>