

## ARTICLE XIII: REVIEW OF THE PROTOCOL

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 XIII *Review of the Protocol* on which the AHG has made progress with the current rolling text containing thirteen sets of square brackets.

### Article XIII

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

#### ARTICLE XIII

#### REVIEW OF THE PROTOCOL

*1. A Review Conference of this Protocol shall be convened within [5] [10] years after the entry into force of this Protocol where States Parties shall meet to review its operation with a view to assuring that the purposes of the Protocol are being realized. Such review shall take into account any new scientific and technological developments relevant to the Protocol. This Review Conference of the Protocol shall be held [immediately following] [in conjunction with] a Review Conference of the Convention. This Review Conference of the Protocol shall be held [at Geneva, Switzerland] [or,] [at the seat of the Organization] [or unless otherwise decided by the Conference].*

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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.

2. At intervals of [5] [10] years thereafter, or earlier if requested by a majority of States Parties to the Protocol by submitting a proposal to this effect to the [Depositary/ies], further such Review Conferences of the Protocol shall be convened with the same objective, [immediately following] [in conjunction with] a Review Conference of the Convention.

4. The ~~striketrough~~ version of Article XI provided<sup>3</sup> by the FOC on Legal Issues for further consideration proposes:

### ARTICLE XIII

#### REVIEW OF THE PROTOCOL

1. ~~A~~ **The first** Review Conference of this Protocol shall be convened within ~~5~~ ~~10~~ years after the entry into force of this Protocol ~~where States Parties shall meet to review its operation~~ with a view to assuring that the purposes of the Protocol are being realized. Such review shall take into account any new scientific and technological developments relevant to the Protocol. ~~This Review Conference of the Protocol shall be held [immediately following] [in conjunction with] a Review Conference of the Convention. This Review Conference of the Protocol shall be held [at Geneva, Switzerland] [or,] [at the seat of the Organization] [or unless otherwise decided by the Conference].~~

2. At intervals of ~~5~~ ~~10~~ years thereafter, ~~or earlier if requested~~ **unless otherwise decided by** a majority of States Parties to the Protocol by submitting a proposal to this effect to the [Depositary/ies], further such Review Conferences of the Protocol shall be convened with the same objective, ~~[immediately following] [in conjunction with] a Review Conference of the Convention.~~

3. **Where appropriate, the Review Conferences of the Protocol shall be timed to coincide with the Review Conferences of the Convention.**

#### Evaluation

5. Review offers a vital mechanism for the evolution of a treaty regime without amending its provisions. It offers opportunities for evaluation on a continuing basis of the effectiveness of the treaty and, through the text of the final declarations, for the issuing of exhortations and agreeing political commitments, interpretative statements and elaboration of procedures laid down in the treaty. The history of the BTWC's own review process provides examples of all of these functions performed by one or more of the first four Review Conferences.

6. Provisions for review are provided in the BTWC as Article XII:

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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.

## ARTICLE XII

*Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depositary Governments, a conference of States Parties to the Convention shall be held at Geneva, Switzerland, to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention, including the provisions concerning negotiations on chemical weapons, are being realized. Such review shall take into account any new scientific and technological developments relevant to the Convention.*

in the Chemical Weapons Convention (CWC)<sup>4</sup> as paragraph 22 of Article VIII *The Organization*:

*22. The Conference shall not later than one year after the expiry of the fifth and the tenth year after the entry into force of this Convention, and at such other times within that time period as may be decided upon, convene in special sessions to undertake reviews of the operation of this Convention. Such reviews shall take into account any relevant scientific and technological developments. At intervals of five years thereafter, unless otherwise decided upon, further sessions of the Conference shall be convened with the same objective.*

and in the Comprehensive Test Ban Treaty (CTBT)<sup>5</sup> as Article VIII:

## ARTICLE VIII

### REVIEW OF THE TREATY

*1. Unless otherwise decided by a majority of the States Parties, ten years after the entry into force of this Treaty a Conference of the States Parties shall be held to review the operation and effectiveness of this Treaty, with a view to assuring itself that the objectives and purposes in the Preamble and the provisions of the Treaty are being realized. Such review shall take into account any new scientific and technological developments relevant to this Treaty. On the basis of a request by any State Party, the Review Conference shall consider the possibility of permitting the conduct of underground nuclear explosions for peaceful purposes. If the Review Conference decides by consensus that such nuclear explosions may be permitted, it shall commence work without delay, with a view to recommending to States Parties an appropriate amendment to this Treaty that shall preclude any military benefits of such nuclear explosions. Any such proposed amendment shall be communicated to the Director-General by any State Party and shall be dealt with in accordance with the provisions of Article VII.*

*2. At intervals of ten years thereafter, further Review Conferences may be convened with the same objective, if the Conference so decides as a matter of procedure in the*

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<sup>4</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>

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

*preceding year. Such Conferences may be convened after an interval of less than ten years if so decided by the Conference as a matter of substance.*

*3. Normally, any Review Conference shall be held immediately following the regular annual session of the Conference provided for in Article II.*

7. It is convenient to divide the evaluation of Article XIII of the Protocol into five parts: purposes, periodicity, coincidence with the BTWC Review Conferences, location and relationship to the Conference of the Organization to be created under Article IX.

#### *Purposes*

8. The draft Protocol text states that the States Parties "*shall meet to review its operation*" which corresponds to the review of *operation* specified in Article XII of the BTWC and in paragraph 22 of Article VIII of the CWC, and *operation and effectiveness* of the Treaty in paragraph 1 of Article VIII of the CTBT.

9. In addition, the draft Protocol text states "*with a view to assuring that the purposes of the Protocol are being realized.*" This is language common to the BTWC, CWC and CTBT although the BTWC adds "the purposes of the **preamble and the provisions**" of the Convention and the CTBT adds "the **objectives and** purposes of the **preamble and the provisions**" of the Treaty.

10. The next sentence "*Such review shall take into account any new scientific and technological developments relevant to the Protocol*" has equivalents in each of the three treaties. In the BTWC, the corresponding language is that "*Such review shall take into account any new scientific and technological developments relevant to the Convention.*" Unique to the BTWC, and happily not in need of repetition since 1993, is the requirement to review "*the provisions concerning negotiations on chemical weapons*" under Article IX of the BTWC which committed all States Parties "*to continue negotiations in good faith*" for such an agreement.

11. Although the ~~striketrough~~ version of Article XI provided by the FOC on Legal Issues for further consideration proposes deletion of the phrase "*where States Parties shall meet to review its operation*", our view is that it is highly desirable to retain the requirement for the review of *operation* before the reference to *purposes*. This is because the Protocol has as its *purposes* the strengthening of the effectiveness and improving the implementation of the Convention. The *operation* of the Protocol involves procedures for declarations, visits, investigations and other measures, as well as for cooperation in peaceful applications of microbiology and programmes of assistance and protection. It includes provisions for national implementation and the international organization. It is therefore highly operational, and its *operation* will benefit from regular review.

#### *Periodicity*

12. Paragraph 1 begins "*1. A Review Conference of this Protocol shall be convened within [5] [10] years after the entry into force of this Protocol.*" A periodicity of 5 years corresponds to the provisions of the BTWC in Article XII and of the CWC in paragraph 22 of Article VIII. The 10 year figure corresponds to the example of the CTBT. We also note that

the ~~strike through~~ text favours 5 years. This evaluation recommends 5 years for reasons set out below in discussion of the question of *coincidence* with BTWC Review Conferences.

13. Paragraph 2 reads "2. *At intervals of [5] [10] years thereafter, or earlier if requested by a majority of States Parties to the Protocol by submitting a proposal to this effect to the [Depositary/ies], further such Review Conferences of the Protocol shall be convened with the same objective,*". As with the provisions of the BTWC in Article XII, as it has come to be interpreted -- see the next paragraph -- the presumption is that Review Conferences shall take place at regular intervals. There is no qualification, as there is in the CWC where in paragraph 22 of Article VIII the phrase "unless otherwise decided upon" is used in relation to the holding of the first **two** Review Conferences at intervals of 5 and 10 years respectively after entry into force, and in the CTBT in Article VIII paragraph 1 where "*Unless otherwise decided by a majority of the States Parties*" the first Review Conference shall be held 10 years after entry into force. The language in the Protocol, assuming the adoption of a 5-year frequency, would have the effect of making 5-year intervals the norm: there is a presumption in favour of the holding of Review Conferences every five years after the first review has taken place. This makes good sense given the equally strong presumption of the Fifth, Sixth and subsequent BTWC Review Conferences taking place in 2001, 2006 and at five-year intervals thereafter.

14. It should be noted that only since the Third Review Conference of the BTWC in 1991 has there been a presumption in favour of a continuing series of BTWC Review Conferences being held "*at least every five years*" because the Final Declaration<sup>6</sup> of the Third Review Conference stated that:

*The Review Conference recommends that conferences of States Parties to review the operation of the Convention should be held at least every five years.*

Identical language was included in the Final Declaration<sup>7</sup> of the Fourth Review Conference in 1996. It remains only a presumption because it took the form of a recommendation and it is always open to future Review Conferences to modify the pattern. The BTWC itself, in Article XII, only mandated a single Review Conference "*Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties...*" and was silent on the subject of any subsequent reviews. The First Review Conference in 1980 had great difficulty arriving at agreed wording for its Final Declaration on this subject, because some States Parties wanted a firm commitment to 1985 while others wanted no time frame at all, with a further Review Conference to be held only if requisitioned by a majority. It therefore produced compromise wording<sup>8</sup>: "*The Conference decides that a second Review Conference shall be held in Geneva at the request of a majority of States Parties not earlier than 1985 and, in any case, not later than 1990*". Not until 1984 was the date of 1986 agreed upon as

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<sup>6</sup>United Nations, *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*, 9 - 27 September 1991, Final Document, Final Declaration, BWC/CONF.III/23, Geneva, 1992, Part II, p. 24.

<sup>7</sup>United Nations, *Fourth 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*, 25 November - 6 December 1996, Final Document, Final Declaration, BWC/CONF.IV/9, Geneva, 1996, Part II, p. 28.

<sup>8</sup>United Nations, *First 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*, 3 - 21 March 1980, Final Document, Final Declaration, BWC/CONF.I/9, Geneva, 21 March 1980.

the date of the Second Review Conference. That Conference, in turn, decided<sup>9</sup> "that a third Review Conference shall be held in Geneva at the request of a majority of States Parties not later than 1991" but said nothing about the desirability of further reviews or their periodicity.

15. We note that the ~~striketrough~~ text proposes that "At intervals of 5 years thereafter, unless recommended otherwise by a majority of States Parties to the Protocol by submitting a proposal to this effect to the [Depositary/ies], further such Review Conferences shall be convened with the same objective. This language removes the explicit option of holding the Review Conference earlier than at 5-year intervals if requested by a majority of States Parties. The presumption is that the Review Conferences will be held at 5-year intervals unless a majority decide otherwise -- which could be earlier or later.

#### *Coincidence with BTWC Review Conferences*

16. It is also appropriate to take into account the additional paragraph which appeared in the ~~striketrough~~ text in October 1999 which states "3. Where appropriate, the Review Conferences of the Protocol shall be timed to coincide with the Review Conferences of the Convention.". This proposal neatly elides the alternatives in the current second paragraph of Article XII which in square brackets offers "immediately following" or "in conjunction with". It thus leaves open, for decision on a case by case basis, the exact timing of the Review Conferences of the Protocol in relation to those of the Convention. "Where appropriate" the States Parties to the Protocol might meet immediately before or immediately after the BTWC Review Conference. The proposed ~~striketrough~~ text for paragraph 3 allows either, and also allows for different modes of *coincidence* at different points in the life of the Protocol, as well as for the possibility -- although the presumption seems to be tilted against it -- that there might even be occasions when it would be preferable for a Review Conference of the Protocol to take place at a time completely unrelated to the periodicity of the BTWC Review Conferences.

17. The easiest way of securing *coincidence* in the periodicity of the two sets of Review Conferences might be for the States Parties to the Protocol to use the word "within" in the "within 5 years" provision in Paragraph 1 to enable them to hold their first Protocol Review Conference in 2006, the year of the BTWC Sixth Review Conference, even though the Protocol will evidently not have been in force for 5 years by then. The same argument could be used for holding the first Protocol Review Conference in 2011, to coincide with the BTWC Seventh Review Conference, should the entry into force of the Protocol be delayed until some time after 2006. In this eventuality, too it would take place *within* 5 years rather than *after* 5 years had elapsed from entry into force.

18. From 2011, then, if not necessarily from 2006, it should be possible both to observe 5-year intervals unless otherwise decided by a majority, and to enable *coincidence* of the Review Conferences of the BTWC and the Protocol respectively on each occasion, except when the States Parties to the Protocol may decide that this is not appropriate.

19. In order to facilitate the coincidence of the two series of Review Conferences there would be advantage in the formulation in Article XIII of the Protocol reflecting the presumption that

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<sup>9</sup>United Nations, *Second 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*, 8 - 26 September 1986, Final Document, Final Declaration, BWC/CONF.II/13, Geneva, 26 September 1986.

the BTWC Review Conferences shall be held "*at least every five years*". In other words, the language in paragraph 2 could with advantage be amended to read "*At intervals of at least every 5 years thereafter,...*". Greater precision in Article XIII would be undesirable, because it would reduce flexibility, and flexibility in these provisions is essential for the relationship between the two review processes to find its way into a productive synchronization. Exactly how fast and how fully that will happen will depend on a number of imponderables, not least the future role of BTWC Review Conferences and the success of the Protocol in attracting a larger or smaller proportion of the BTWC States Parties so that they became Parties to the Protocol too. The relationship is likely to be easier if a large proportion of BTWC States Parties become Parties to the Protocol at an early date, but this cannot be taken for granted.

20. A further benefit from the *coincidence* of the BTWC and the Protocol Review Conferences will come in respect of the requirement for both reviews to *take into account any new scientific and technological developments* as States could then prepare a single review document for submission to both Review Conferences.

21. This evaluation therefore favours the 5-year frequency together with the language proposed in the ~~striketrough~~ text for both paragraph 2 and 3 amended so as to commence in paragraph 2 with "*At intervals of at least every 5 years thereafter,...*".

#### *Location*

22. The language for Article XIII offers the options within square brackets of [*at Geneva, Switzerland*][*or, [at the seat of the Organization]*][*or unless otherwise decided by the Conference*]. The ~~striketrough~~ text deletes this language. This deletion is to be recommended on the grounds of flexibility, especially in view of the desirability of *coincidence* of the two Review Conferences and the language discussed above which maximizes the flexibility of the timing of the Protocol Review Conferences.

#### *Relationship to the Conference of the Organization*

23. Article IX *The Organization* of the Protocol contains language that establishes *the Organization for the Prohibition of Bacteriological (Biological) and Toxin Weapons* together with *the Conference of States Parties, the Executive Council and the Technical Secretariat* as its organs. The section of Article IX addressing the Conference of States Parties makes specific provision in paragraph 13 that "*The Conference may also be convened in the form of a Review Conference, in accordance with Article...*". It can thus be expected that this will have an effect on the nature of the Protocol Review Conferences. It is probable that they will come to resemble the "*special sessions to undertake reviews*" of the CWC which its Conference of States Parties is mandated to hold by paragraph 22 of Article VIII of that Convention. Exactly how moving into the review mode will affect the conduct of the OPCW's supreme governing body, which will by then have held an opening session and five regular sessions, even if no special sessions have been held for other purposes, is impossible to predict. There is also uncertainty over the status of decisions taken in special Review Conference sessions *vis-à-vis* decisions taken by the Conference at other times. As one analysis<sup>10</sup> has pointed out:

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<sup>10</sup>Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht, Martinus Nijhoff, 1994, p.145.

*Since review conferences are designated in paragraphs 12 and 22 [of CWC Article VIII] as special sessions of the Conference it will be difficult to confer a higher status to their decisions or recommendations than to those of regular or other special sessions of the Conference. If they have a legally equal status, their modification by subsequent sessions of the Conference will be possible.*

24. Although Article XIII of the Protocol contains no reference to the Conference meeting in special session to undertake reviews, it is clear from Article IX of the Protocol that the Conference of States Parties will be convened as a Review Conference. It will consequently be all the more important to have text for Article XIII which maximizes flexibility as to the timing and location of reviews while preserving the principle of *coincidence where appropriate* with BTWC Review Conferences.

### **Strikethrough Text for Article XIII**

25. It is recommended that Article XIII should read as follows:

#### *ARTICLE XIII*

##### *REVIEW OF THE PROTOCOL*

*1. **The first** A Review Conference of this Protocol shall be convened within ~~5~~ ~~10~~ years after the entry into force of this Protocol where States Parties shall meet to review its operation with a view to assuring that the purposes of the Protocol are being realized. Such review shall take into account any new scientific and technological developments relevant to the Protocol. ~~This Review Conference of the Protocol shall be held [immediately following] [in conjunction with] a Review Conference of the Convention. This Review Conference of the Protocol shall be held [at Geneva, Switzerland] [or,] [at the seat of the Organization] [or unless otherwise decided by the Conference].~~*

*2. At intervals of **at least every** ~~5~~ ~~10~~ years thereafter, ~~or earlier if requested unless otherwise decided~~ by a majority of States Parties to the Protocol by submitting a proposal to this effect to the [Depositary/ies], further such Review Conferences of the Protocol shall be convened with the same objective, ~~[immediately following] [in conjunction with] a Review Conference of the Convention.~~*

*3. **Where appropriate, the Review Conferences of the Protocol shall be timed to coincide with the Review Conferences of the Convention.***