

## ARTICLE XX: ENTRY INTO FORCE

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 XX *Entry into Force* on which the AHG has made good progress with the current rolling text containing two alternative forms of language with two pairs of square brackets within one alternative.

### Article XX

3. In the April 1999 draft Protocol<sup>2</sup>, the text for Article XX contained, within square brackets, a single form of language:

#### ARTICLE XX

#### ENTRY INTO FORCE

*[1. This Protocol shall enter into force ... days after the date of the deposit of the ...th instrument of ratification, but in no case earlier than ... years after its opening for signature.*

*2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Protocol, it shall enter into force on the [30]th day following the date of deposit of their instrument of ratification or accession.]*

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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/45, 14 April 1999, Geneva.

4. In July 1999, the text for Article XX was developed<sup>3</sup> into its current form which contains two alternatives:

*ARTICLE XX*

*ENTRY INTO FORCE*

*[[1. This Protocol shall enter into force 180 days after the date of the deposit of the 50th instrument of ratification, but not earlier than two years after its opening for signature.*

*2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Protocol, it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.]*

*OR*

*[1. This Protocol shall enter into force 180 days after the deposit of instruments of ratification by [45][75] States, including the Governments of the Depositaries of the Convention, but not earlier than two years after its opening for signature.*

*2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Protocol, it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.]]*

5. The ~~striketrough~~ version of Article XXII provided<sup>4</sup> by the FOC on Legal Issues for further consideration is essentially identical to that in the draft Protocol. It has, however, been presented in such a way as to show that paragraph 2 is not in contention as this is present in both options in the draft Protocol text.. Although bold text has been used in the FOC ~~striketrough~~ text, this is in error as there are effectively no changes, apart from 'two' becoming '2' in paragraph 1:

*ARTICLE XX*

*ENTRY INTO FORCE*

*[[1. This Protocol shall enter into force **180** days after the date of the deposit of the **50th** instrument of ratification, but ~~in no case~~ not earlier than **2** years after its opening for signature.*

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<sup>3</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.

<sup>4</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.

**OR**

*[1. This Protocol shall enter into force 180 days after the deposit of instruments of ratification by [45][75] States, including the Governments of the Depositaries of the Convention, but not earlier than 2 years after its opening for signature.]*

*2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Protocol, it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.]*

**Evaluation**

6. It is useful to compare the Protocol Article XX language with that relating to entry into force in the BTWC as well as that in more recent conventions and treaties such as that in the Chemical Weapons Convention (CWC) and in the Comprehensive Nuclear-Test-Ban Treaty (CTBT).

7. Article XIV of the BTWC<sup>5</sup> which opened for signature in 1972 includes in a single Article provisions for signature, ratification, accession and the depositaries as well as for entry into force. The paragraphs relating to entry into force state:

*3. This Convention shall enter into force after the deposit of instruments of ratification by twenty-two governments, including the Governments designated as Depositaries of the Convention.*

*4. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of deposit of their instrument of ratification or accession.*

8. The later language of the CWC<sup>6</sup> which opened for signature in 1993 contains a single Article XXI addressing Entry into Force:

**ARTICLE XXI**

**ENTRY INTO FORCE**

*1. This Convention shall enter into force 180 days after the date of the deposit of the 65th instrument of ratification, but in no case earlier than two years after its opening for signature.*

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<sup>5</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>6</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>

2. *For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.*

9. The CTBT<sup>7</sup> which opened for signature in 1996 addresses Entry into Force in Article XIV:

#### ARTICLE XIV

##### ENTRY INTO FORCE

1. *This Treaty shall enter into force 180 days after the date of the deposit of the instruments of ratification by all States listed in Annex 2 to this Treaty, but in no case earlier than two years after its opening for signature.*

2. *If this Treaty has not entered into force three years after the date of the anniversary of its opening for signature, the Depositary shall convene a Conference of the States that have already deposited their instruments of ratification upon the request of a majority of those States. That Conference shall examine the extent to which the requirement set out in paragraph 1 has been met and shall consider and decide by consensus what measures consistent with international law may be undertaken to accelerate the ratification process in order to facilitate the early entry into force of this Treaty.*

3. *Unless otherwise decided by the Conference referred to in paragraph 2 or other such conferences, this process shall be repeated at subsequent anniversaries of the opening for signature of this Treaty, until its entry into force.*

4. *All States Signatories shall be invited to attend the Conference referred to in paragraph 2 and any subsequent conferences as referred to in paragraph 3, as observers.*

5. *For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Treaty, it shall enter into force on the 30th day following the date of deposit of their instruments of ratification or accession.*

Annex 2 to the Treaty provides a *List of States Pursuant to Article XIV* which is a list of the 44 States members of the Conference on Disarmament as at 18 June 1996 which formally participated in the work of the 1996 session of the Conference on Disarmament and which appear in Table 1 of either the International Atomic Energy Agency's April 1996 edition of "Nuclear Power Reactors in the World" or the IAEA's December 1995 edition of "Nuclear Research Reactors in the World".

10. Finally, the Convention on Anti-Personnel Mines<sup>8</sup> which opened for signature in December 1997 addresses Entry into Force in Article 17:

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<sup>7</sup>*Comprehensive Nuclear-Test-Ban Treaty*. Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

<sup>8</sup>*Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of Anti-Personnel Mines and on Their Destruction*, 18 September 1997. Available on the web at <http://www.mines.gc.ca/english/documents/treaty.html>

## Article 17

### Entry into Force

1. This Convention shall enter into force on the first day of the sixth month after the month in which the 40th instrument of ratification, acceptance, approval or accession has been deposited.

2. For any State which deposits its instrument of ratification, acceptance, approval or accession after the date of the deposit of the 40th instrument of ratification, acceptance, approval or accession, this Convention shall enter into force on the first day of the sixth month after the date on which that State has deposited its instrument of ratification, acceptance, approval or accession.

11. These different requirements for entry into force can be summarised as follows:

Legal Instrument	Draft BTWC Protocol	BTWC	CWC	CTBT	Anti-personnel mines
Ratifications for entry into force	Option A: 50 Option B: 45 or 75 (inc BTWC Depositaries)	22 (inc Depositaries)	65	44 listed States	40

12. There are two specific elements that need to be addressed. First, the number of instruments of ratification that need to be deposited for entry into force, and second, whether this number should include the three Depositaries of the BTWC.

13. **The number of instruments of ratification that need to be deposited for entry into force.** The argument that is usually involved in such considerations relates to the achievement of a reasonable number of States Parties as a starting point along the road towards universality. When, however, a Protocol to an existing Convention is being considered, as is the case with the BTWC Protocol, there is a different argument in that because the basic prohibition is already in place, the incentive is to bring the new Protocol and the organization to implement the Protocol into operation with its full authority as quickly as possible so that the benefits of the new Protocol can be realised. As we point out in our Evaluation Paper on Article XXII *Depositary/ies*<sup>9</sup> the BTWC Organization will have a major role to play in recruitment of States Parties to the Protocol and the promotion of universality. Consequently, the number of States Parties required to ratify prior to entry into force should be kept low. If the CWC information in the next paragraph is taken as the model, it can be seen that 2 years after opening for signature 20 States had ratified the CWC. Consequently, to achieve entry into force and the bringing of the new Organization into operation with its full authority at an early date soon after 2 years after opening for signature,

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<sup>9</sup>Graham S. Pearson & Nicholas A. Sims, *Article XXII: Depositary/ies*, Evaluation Paper No. 7, University of Bradford, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

a realistic number of States required to have deposited their instruments of ratification would be 20.

14. The experience of the Organization for the Prohibition of Chemical Weapons (OPCW) established to implement the CWC is also informative. An examination of the numbers of States which ratified the CWC as a function of time shows that 2 years after opening for signature the number of instruments deposited had reached 20 and that after 3 years that number had risen to 47. It was over 4 years after opening for signature that the CWC entered into force and when it did, on 29 April 1997, 80 States had deposited their instruments of ratification.

#### **Ratifications of the CWC<sup>10</sup>**

(Opened for signature on 11 - 13 January 1993. Entered into force on 29 April 1997  
180 days after deposit of 65th instrument on 31 October 1996)

Time after opening for signature	6 months	12 months	18 months	24 months	30 months	36 months	42 months	48 months	54 months
No of State Parties	4	4	9	20	31	47	57	67	97

15. There are a further two points that arise from the OPCW experience. First, that the staffing of the Organization takes a finite period of time -- and cannot be established prior to entry into force as its membership will be drawn from the nationals of the States Parties -- and second, the time lines specified in the Convention dictated what work the OPCW had to carry out in its first few months after entry into force. It has also become clear that the inability of States Parties to meet their obligations under the Convention on time has been beneficial to the OPCW which has been able to grow its capabilities in time to meet the demands placed on the Organization. Consequently, there is an argument that a small Organization to implement the BTWC Protocol will be able to function more effectively if the number of instruments of ratification required to be deposited for entry into force to occur is kept small as the Organization can then keep pace with the implementation of the Protocol as the number of States Parties increases over time.

16. **Assessment.** For the Protocol to the BTWC, there are clear advantages from an early entry into force and the bringing of the new Organization into operation with its full authority at an early date and consequently a requirement for the deposit of a **smaller** number than 75 or even 65 instruments of ratification is favoured. The CWC experience shows that for entry into force and the bringing of the new Organization into operation with its full authority in 2 years, a number of 20 would be appropriate.

17. **The inclusion of the Depositaries of the BTWC.** The argument for the specific inclusion or exclusion of a requirement for the three Depositaries of the BTWC, the Russian Federation, the United Kingdom and the United States, to have deposited their instruments of ratification before entry into force of the Protocol to the BTWC is more complex. In an ideal world, the three states having, as it were, led the way through being Depositaries of the

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<sup>10</sup>Organization for the Prohibition of Chemical Weapons, *States Parties to the Chemical Weapons Convention*, Chronological list, Available on <http://www.opcw.nl/memsta/ratifyer.htm>

BTWC could be expected to be amongst the first to ratify the Protocol as they would be amongst the principal protagonists of the effective strengthening of the BTWC and thus favour the early entry into force of the Protocol -- and, consequently, there would be no necessity to require them specifically to deposit their instruments of ratification before entry into force of the Protocol.

18. However, in practice, the situation is not as straightforward. The record of the past decade has not shown all three states taking the lead in ratifying arms control conventions and treaties. Although the UK record has been reasonable -- the UK was the 51st to ratify the CWC on 13 May 1996, ratified the CTBT on 6 April 1998 and ratified the Anti-Personnel Mines Convention on 31 July 1998 -- the same cannot be said for the other two states. The US was the 80th to ratify the CWC on 25 April 1997 -- four days before it entered into force - - and has yet to ratify the CTBT and has not signed or ratified the Anti-Personnel Mines Convention. Russia was the 104th to ratify the CWC on 5 November 1997 and has yet to ratify the CTBT and has not signed or ratified the Anti-Personnel Mines Convention.

19. In considering whether or not the requirements for entry into force should include the deposit of instruments of ratification by the Depositories, it is noted that there are six treaties which all date from the 1960s and the early 1970s with the triple-depositary mechanism which require deposit of instruments of ratification by the Depositories of which the BTWC was the last. In chronological order these are:

Year	Treaty	Article	Entry into Force Requirement
1963	Limited Test Ban Treaty <sup>11</sup>	III.3	'after ratification by all the Original Parties' - -the US, UK and Soviet Union.
1967	Peaceful Uses of Outer Space <sup>12</sup>	XIV.3	'five Governments including the Governments designated as Depositary Governments'
1968	Rescue and Return of Astronauts and Objects <sup>13</sup>	7.3	'five Governments including the Governments designated as Depositary Governments'
1968	Nuclear Non-Proliferation Treaty <sup>14</sup>	IX.3	'the Governments which are designated Depositaries of the Treaty, and forty other States'

<sup>11</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>12</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>

<sup>13</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>14</sup>United Nations, *Treaty on the Non-Proliferation of Nuclear Weapons*, Treaty Series, Vol. 729, I. No. 10485, 168-175, 1970.

Year	Treaty	Article	Entry into Force Requirement
1971	Sea-Bed Treaty <sup>15</sup>	X.3	'twenty-two Governments including the Governments designated as Depositary Governments of this Treaty.'
1972	Biological and Toxin Weapons Convention <sup>16</sup>	XIV.3	'twenty-two Governments including the Governments designated as Depositaries of the Convention.'

On entry into force specifically, of the six treaties with the triple-depositary requirement, **all** require their ratification prior to entry into force by all three Depositaries, but only the first, the 1963 Limited Test Ban Treaty, makes that the **only** condition for entry into force.

20. It is noteworthy that other contemporaneous treaties have the UN Secretary-General as the Depositary or, if they have the US, UK and the Soviet Union as Depositaries, do not require the deposit of instruments of ratification by the Depositaries.

Year	Treaty	Depositary	Article	Entry into Force Requirement
1961	Vienna Convention on Diplomatic Relations <sup>17</sup>	UN S-G	51.1	'the thirtieth day following the date of deposit of the twenty-second instrument'
1963	Vienna Convention on Consular Relations <sup>18</sup>	UN S-G	77.1	'the thirtieth day following the date of deposit of the twenty-second instrument'
1966	Elimination of all Forms of Racial Discrimination <sup>19</sup>	UN S-G	19.1	'the thirtieth day after the date of deposit...of the twenty-seventh instrument'
1969	Vienna Convention on the Law of Treaties <sup>20</sup>	UN S-G	84.1	'the thirtieth day following the date of deposit of the thirty-fifth instrument'
1970	Patent Cooperation Treaty <sup>21</sup>	Director-General of IPCU	63.1	'three months after eight States have deposited their instruments'

<sup>15</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>16</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>17</sup>*Vienna Convention on Diplomatic Relations and Optional Protocols.* Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH408.txt>

<sup>18</sup>*Vienna Convention on Consular Relations and Optional Protocol.* Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH444.txt>

<sup>19</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>20</sup>*Vienna Convention on the Law of Treaties.* Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH538.txt>

<sup>21</sup>*Patent Cooperation Treaty.* Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH562.txt>



Year	Treaty	Depositary	Article	Entry into Force Requirement
1970	Suppression of Unlawful Seizure of Aircraft <sup>22</sup>	UK, US and Soviet Union	13.3	'thirty days following the date of deposit...by ten States'
1971	Suppression of Unlawful Acts Against the Safety of Civil Aviation <sup>23</sup>	UK, US and Soviet Union	15.3	'thirty days following the date of deposit...by ten States'
1972	International Liability for Damage caused by Space Objects <sup>24</sup>	UK, US and Soviet Union	XXIV.3	'the deposit of the fifth instrument of ratification'
1975	Registration of Objects Launched into Outer Space <sup>25</sup>	UN S-G	VIII.3	'the deposit of the fifth such instrument'
1977	Prohibition of Military or Any Other Hostile Use of Environmental Modification Techniques <sup>26</sup>	UN S-G	IX.3	'the deposit of instruments of ratification by twenty Governments'

21. As pointed out in our Evaluation Paper on Article XXII *Depositary/ies*<sup>27</sup>, 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.

22. It is also of particular interest that, although the 1967 Peaceful Uses of Outer Space Treaty 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

<sup>22</sup>*Convention for the Suppression of Unlawful Seizure of Aircraft*, The Hague, The Netherlands, 16 December 1970.

<sup>23</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>24</sup>*Convention on International Liability for Damage caused by Space Objects*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH595.txt>

<sup>25</sup>*Convention on Registration of Objects Launched into Outer Space*. Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH653.txt>

<sup>26</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>27</sup>Graham S. Pearson & Nicholas A. Sims, *Article XXII: Depositary/ies*, Evaluation Paper No. 7, University of Bradford, September 1999. Available on <http://www.brad.ac.uk/acad/sbtwc>

mechanism and the latter having the UN Secretary-General as Depositary. 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. 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 Convention.

23. It is worth noting that the different approach adopted by the CTBT<sup>28</sup> in which the requirement

*1. This Treaty shall enter into force 180 days after the date of the deposit of the instruments of ratification by all States listed in Annex 2 to this Treaty, but in no case earlier than two years after its opening for signature.*

is for the 44 States listed in Annex 2 to the Treaty to have deposited their instruments of ratification is not a viable option for the BTWC Protocol on at least three grounds. First of all, if an analogous approach were to be taken which States should be selected as being required to deposit their instruments of ratification prior to entry into force? Given that the capabilities for production of microorganisms are so widespread -- there is no microbiological parallel to the IAEA tables of nuclear power reactors and nuclear research reactors -- there would be no logic and it would be highly invidious in selecting some States and neglecting others. Secondly, such a list-based approach would enable any of the selected States to effectively hold all the other States Parties to ransom by refusing to deposit its instrument of ratification until its requests, whatever these were, were met. Finally, such an approach would be contrary to the objective of achieving the rapid entry into force of the Protocol given that the BTWC is already in force and urgently needs to be strengthened. Consequently, an analogous approach to that for entry into force of the CTBT would be inappropriate, invidious and highly inefficient for the entry into force of the BTWC Protocol.

24. As the CWC is the arms control treaty of closest relevance to the BTWC, it is useful to consider its requirements for entry into force more closely. Even though it was well known internationally that the two largest possessors of chemical weapons were the United States and the Russian Federation, there was no requirement that these two largest possessor States should ratify the CWC prior to its entry into force. Indeed, the US ratified four days before entry into force and the Russian Federation some six months after entry into force.

25. The situation regarding the ratification of the CWC by the United States is further exacerbated because the US Senate in its advice and consent to the ratification of the CWC imposed a number of conditions which were binding on the US President. Although these are discussed further in our Evaluation Paper on Article XXI *Reservations*<sup>29</sup>, the principal points are noted here. In essence, although Article XXII of the CWC states that *the Articles*

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<sup>28</sup>*Comprehensive Nuclear-Test-Ban Treaty*. Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

<sup>29</sup>Graham 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>

of this Convention shall not be subject to reservation, the US Senate stated<sup>30</sup> that it reserved the right, pursuant to the Constitution of the United States, to give its advice and consent to ratification of the Convention subject to reservations, notwithstanding Article XXII of the Convention. One of the conditions imposed by the US Senate is regarded by the OPCW as a substantial problem<sup>31</sup>; this is Condition (18) which reads as follows:

*(18) LABORATORY SAMPLE ANALYSIS - Prior to the deposit of the United States instrument of ratification, the President shall certify to the Senate that no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States.*

The subsequent Presidential certification<sup>32</sup> states that *In connection with Condition (18), Laboratory Sample Analysis, no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States.* This was then carried forward into a statement<sup>33</sup> made upon ratification by the United States which stated that:

*"...[the] ratification of the Convention, with Annexes, [is] subject to the condition which relates to the Annex on Implementation and Verification, that no sample collected in the United States pursuant to the Convention will be transferred for analysis to any laboratory outside the territory of the United States"*

This is a damaging condition as one of the key requirements for ensuring that the CWC is a strong Convention is to ensure that any samples resulting from a challenge inspection shall be independently analysed in two internationally accredited laboratories with the possibility of analysis in a third internationally accredited laboratory should there be disagreement between the results from the first two laboratories. It is also a surprising US condition given the past history of divergent analytical results of samples arising in respect of the alleged use of trichothecene mycotoxins in South East Asia. Indeed the past history of the investigation of alleged uses of chemical weapons has repeatedly demonstrated the vital importance of independent analysis blind using validated analytical methods in internationally accredited laboratories.

26. Another qualification which is contrary to both the spirit and the letter of the CWC was imposed in the US legislation to implement the CWC and was again highlighted by the CWC as a substantial problem<sup>34</sup>: this is Section 307 of the Chemical Weapons Convention Implementation Act<sup>35</sup> which states:

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<sup>30</sup>United States Senate, *Executive Resolution 75, Chemical Weapons Convention*, 24 April 1997. Available on the web at <http://www.stimson.org/cwc/s-75.htm>

<sup>31</sup>Arms Control Today, *The CWC at the Two-Year Mark: An Interview with Dr John Gee*, Arms Control Today, April/May 1999, pp.3-9.

<sup>32</sup>The White House, *To the Congress of the United States*, Office of the Press Secretary, 25 April 1997. Available at <http://www.pub.whitehouse.gov/uri-res/12R?urn:pdi://oma.eop.gov.us/1997/4/28/11.text.1>

<sup>33</sup>Organisation for the Prohibition of Chemical Weapons, *OPCW: The Legal Texts*, ed. Lisa Woollomes Tabassi, T.M.C. Asser Press, The Hague, 1999, p. 114.

<sup>34</sup>Arms Control Today, *The CWC at the Two-Year Mark: An Interview with Dr John Gee*, Arms Control Today, April/May 1999, pp. 3-9.

<sup>35</sup>United States Congress, *Omnibus Consolidated and Emergency Supplemental Appropriations Act, 1999.*, Public Law 105-277, 21 October 1998. The *Chemical Weapons Convention Implementation Act of 1998* is on

*SEC. 307. NATIONAL SECURITY EXCEPTION.*

*Consistent with the objective of eliminating chemical weapons, the President may deny a request to inspect any facility in the United States in cases where the President determines that the inspection may pose a threat to the national security interests of the United States.*

CWC Article IX *Consultations, Cooperation and Fact-Finding* is quite clear that there is no right of refusal. Its section headed *Procedures for challenge inspections* states that:

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

*(a) The right and the obligation to make every reasonable effort to demonstrate its compliance with this Convention and, to this end, to enable the inspection team to fulfil its mandate;*

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

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

and makes it clear that States Parties are obliged to provide access.

27. This unsatisfactory situation regarding the US ratification of the CWC is one that should be guarded against, to the maximum possible extent, in finalizing the language of the Protocol to the BTWC. The objective of a strong and effective Protocol will best be served by a Protocol that is ratified rapidly by all States Parties, including the three Depositaries of the BTWC.

28. **Assessment.** Against this background, it is concluded that there is a strong argument for **not** requiring the three Depositaries of the BTWC to have deposited their instruments of ratification of the Protocol prior to its entry into force. The three should be encouraged to be founder States Parties to the Protocol but there should be no requirement for this. Equally, there is a compelling argument against a CTBT type list-based requirement for selected States to have deposited their instruments of ratification prior to entry into force.

**Strike-through text for Article XX**

29. Our view is that Article XX should be based on the first option -- ie the Secretary-General of the United Nations as the Depositary -- and that the number of instruments to be deposited should be reduced to 20 in order to achieve an entry into force and the bringing of

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pages 856-887. Public Law 105-277 is available on the web at <http://www.access.gpo.gov/nara/publaw/105publ.html>

the new Organization into operation with its full authority two years after opening for signature. Consequently, the text should be amended and the remaining square brackets removed as shown in a strike-through text version of Article XX below so as to produce clean text:

*ARTICLE XX*

*ENTRY INTO FORCE*

~~1. This Protocol shall enter into force 180 days after the date of the deposit of the 20th instrument of ratification, but not earlier than two years after its opening for signature.~~

2. For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Protocol, it shall enter into force on the 30th day following the date of deposit of their instrument of ratification or accession.