

## ARTICLE XXI: RESERVATIONS

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 XXI *Reservations* on which the AHG has made good progress with the current rolling text containing three sets of square brackets.

### Article XXI

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

#### ARTICLE XXI

#### RESERVATIONS

*[The Articles of this Protocol [shall not be subject to reservations] [incompatible with its object and purpose or that of the Biological and Toxin Weapons Convention of 1972]. The Annexes and Appendices of this Protocol shall not be subject to reservations incompatible with its object and purpose or that of the Biological and Toxin Weapons Convention of 1972.]*

The ~~striketrough~~ version of Article XXI provided<sup>3</sup> by the FOC on Legal Issues for further consideration proposes removal of the square brackets together with a streamlining of the reference to the Convention as follows:

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\* Graham S. Pearson is a Visiting Professor of International Security in the Department of Peace Studies at the University of Bradford, Bradford, West Yorkshire BD7 1DP, UK.

† Nicholas A. Sims is a Senior Lecturer in International Relations in the Department of International Relations at the London School of Economics and Political Science, University of London, Houghton Street, London WC2A 2AE, UK.

<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.

## ARTICLE XXI

### RESERVATIONS

~~The Articles of this Protocol shall not be subject to reservations incompatible with its object and purpose or that of the *Biological and Toxin Weapons Convention of 1972*. The Annexes and Appendices of this Protocol shall not be subject to reservations incompatible with its object and purpose or that of the *Biological and Toxin Weapons Convention of 1972*.~~

### Evaluation

4. The BTWC<sup>4</sup> made no attempt to prohibit or limit reservations. In this respect, as in many others, its formal structure and especially its final clauses were modelled on the 1971 Sea Bed Treaty<sup>5</sup>, which the Conference of the Committee on Disarmament had negotiated in 1969 and 1970 immediately prior to the BTWC, and which in turn reflected the language of the 1968 Nuclear Non-Proliferation Treaty<sup>6</sup>.

5. Prohibition of reservations was introduced in Article XXII of the Chemical Weapons Convention (CWC)<sup>7</sup> which states:

## ARTICLE XXII

### RESERVATIONS

*The Articles of this Convention shall not be subject to reservations. The Annexes of this Convention shall not be subject to reservations incompatible with its object and purpose.*

and repeated in Article XV of the Comprehensive Test Ban Treaty (CTBT)<sup>8</sup> which states:

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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>*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>6</sup>United Nations, *Treaty on the Non-Proliferation of Nuclear Weapons*, Treaty Series, Vol. 729, I. No. 10485, 168-175, 1970.

<sup>7</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>8</sup>*Comprehensive Nuclear-Test-Ban Treaty*. Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

## ARTICLE XV

### RESERVATIONS

*The Articles of and the Annexes to this Treaty shall not be subject to reservations. The provisions of the Protocol to this Treaty and the Annexes to the Protocol shall not be subject to reservations incompatible with the object and purpose of this Treaty.*

6. However, in neither case was the prohibition fully comprehensive. In the CWC it was absolute in respect of the Articles of the Convention, but not the Annexes. In the CTBT it was absolute in respect of the Treaty **and** its Annexes, but not the Protocol or Annexes to the Protocol. Instead, any reservations to the CWC Annexes must meet the test of not being incompatible with the object and purpose of the Convention, and any reservations to the CTBT Protocol or Annexes to the Protocol must not be incompatible with the object and purpose of the Treaty.

7. If all the square brackets are removed from the BTWC Protocol Article XXI, a similar test would be required for any reservations to the Annexes or Appendices to the Protocol. Namely, that they must not be incompatible with the object and purpose of the Protocol or that of the BTWC.

8. In respect of the Articles of the Protocol itself, there are currently two alternatives in the current rolling text: an absolute ban on reservations or a conditional ban. In the latter case, the condition would be the same test as is proposed for any reservations to the Annexes or Appendices -- that they must not be incompatible with the object and purpose of the Protocol or that of the BTWC.

9. The words *object and purpose* are familiar from Article XVIII of the 1969 Vienna Convention on the Law of Treaties<sup>9</sup> under which the States Signatories to a treaty which is subject to ratification are under the minimal obligation *to refrain from acts which would defeat the object and purpose of the treaty* so long as future ratification has not been ruled out. However, the words *object and purpose* are not without problems. As Walter Krutzsch and Ralf Trapp have pointed out in their commentary<sup>10</sup> on Article XXII of the CWC, there is no authoritative definition of the object and purpose of that Convention, so any test of compatibility will be necessarily subjective and arguments over it will be inconclusive.

10. They also draw attention to other ambiguities in the CWC compromise. Thus, it is left unclear how a State may object to a reservation to the CWC Annexes on the grounds that it is incompatible with the object and purpose of the Convention or repudiate such an objection. Krutzsch and Trapp point out that *If there were different reservations by different Signatories objected to by different Signatories, the result would be an absolute confusion and a destruction of the unity of the Convention.*<sup>11</sup> They proceed to note the decision-making procedure in CWC Article XV *Amendments* and comment that:

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<sup>9</sup>*Vienna Convention on the Law of Treaties.* Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH408.txt>

<sup>10</sup>Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht, Martinus Nijhoff, 1994, p.250-251.

<sup>11</sup>Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht, Martinus Nijhoff, 1994, p.250

*It might be concluded that this intention existed also with regard to reservations, yet was not sufficiently expressed in the text of Article XXII, which was hardly discussed in its final version.*

*According to this interpretation, if there were objections to a reservation it would be up to the Signatories to decide together whether an objection on the grounds of incompatibility of the reservation with the object and purpose of the Convention should take effect. A majority decision of the signatories (sic, lower case s) should determine the validity of the reservation erga omnes.*

11. Finally, Krutzsch and Trapp draw attention to the problem that no clear line can be drawn separating those provisions of the CWC Annexes which have a bearing on the object and purpose of the Convention from those which do not. Consideration of paragraph 4 of CWC Article XV *Amendments* which states that:

*4. In order to ensure the viability and the effectiveness of this Convention, provisions in the Annexes shall be subject to changes in accordance with paragraph 5, if proposed changes are related only to matters of an administrative or technical nature. All changes to the Annex on Chemicals shall be made in accordance with paragraph 5. Sections A and C of the Confidentiality Annex, Part X of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections, shall not be subject to changes in accordance with paragraph 5.*

**suggests** that reservations to the provisions in Annexes governing declaration, verification and confidentiality obligations *may be regarded as incompatible with the object and purpose of the Convention and consequently objectionable*<sup>12</sup> but this, too, is left ambiguous. Consequently, the CWC model is not necessarily one to be followed in the Protocol Article XXI.

12. A straightforward ban on reservations applied overall by language such as *The Articles of and the Annexes and Appendices to this Protocol shall not be subject to reservations* would have the virtue of simplicity. This alone will ensure that all eventual States Parties to the Protocol enter into the same set of obligations. It would also have the advantage of consistency with Article XVI *Status of the Annexes and Appendices* because, if all the Annexes and Appendices really do form *an integral part of the Protocol* as proclaimed in Article XVI, they should enjoy equally full protection against damage by reservation. This will be all the more important if, as may be expected, the Ad Hoc Group ends up including in the Annexes and Appendices some matters of substance crucial to the credibility and successful operation of the Protocol, for example, in relation to Investigations and to Confidentiality.

13. Even with such absolute bans on reservations, the principle of common obligation may be circumvented. The CWC, as already noted, allowed no reservations in respect of the Articles of the Convention. Yet the ratification debates in the United States Senate in 1997 leant heavily on the negotiation with the Executive Branch of conditions purporting to limit

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<sup>12</sup>Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht, Martinus Nijhoff, 1994, p.251

US implementation in specific ways<sup>13</sup> -- even including a purported repudiation of the ban in Article XXII of the CWC on reservations to the Articles of the Convention. Indeed in the first of 28 conditions, the United States Senate stated<sup>14</sup> that:

*The Senate's advice and consent to the ratification of the Chemical Weapons Convention is subject to the following conditions which shall be binding on the President:*

*(1) EFFECT OF ARTICLE XXII -- Upon the deposit of the United States instrument of ratification, the President shall certify to the Congress that the United States has informed all other States parties to the Convention that the Senate reserves 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.*

The Presidential certification<sup>15</sup> states:

*I hereby certify that:*

*In connection with Condition (1), Effect of Article XXII, the United States has informed all other States Parties to the Convention that the Senate reserves 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.*

14. Another Senate condition is regarded by the OPCW as a substantial problem<sup>16</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>17</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>18</sup> made upon ratification by the United States which stated that:

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<sup>13</sup>The list of 28 conditions subject to which the US Senate gave its advice and consent to the ratification by the United States of the CWC can be found in 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>14</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>15</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>16</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>17</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>18</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.

*"...[the] ratification of the Convention, with Annexes, [is] subject to the condition which relates to the Annexe 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"*

As noted in our Evaluation Paper on Article XX *Entry into Force*<sup>19</sup>, 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.

15. In addition to these Senate conditions, 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: this is Section 307 of the Chemical Weapons Convention Implementation Act<sup>20</sup> which states:

*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.*

This is in contradiction to CWC Article IX *Consultations, Cooperation and Fact-Finding* which is quite clear that there is no right of refusal. The section of Article IX 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.

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<sup>19</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>20</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 pages 856-887. Public Law 105-277 is available on the web at <http://www.access.gpo.gov/nara/publaw/105publ.html>

16. Whatever may or may not be the international legal standing of such conditions, they constitute a political fact; and they demonstrate that devices other than reservations, may be employed openly to reinterpret obligations, thereby **weakening the treaty regime**, in ways that other States Parties may find disconcerting but can do nothing to remedy.

17. It was in order to make harder the circumvention of a ban on reservations that the negotiators of the CWC were, in 1989-90, considering, in Appendix II material, *papers reflecting the results of work undertaken so far on issues in the Convention*, the following possible provisions<sup>21</sup>:

1. *No reservations or exceptions, however phrased or named, [including interpretative statements or declarations], may be made to this Convention [unless expressly permitted by other provisions of the Convention].*

2. *The provision in paragraph 1 above does not preclude a State when signing, ratifying or acceding to this Convention, from making statements or declarations, however phrased or named, provided that such statements or declarations do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.*

Language of this kind will be necessary if the BTWC Protocol is to guard against circumvention of its ban on reservations. Even then, it will not be proof against determined circumvention. But it will send a stronger signal than if such language is not included.

18. The one advantage of reservation, if circumvention by other devices is **not** ruled out, is that they are formal statements to which formal objections can be registered in a procedure recognized as part of international law. Thus, on 18 August 1976, the United States formally objected to one of the reservations attached by Switzerland to its ratification of the BTWC on 4 May 1976.<sup>22</sup> It made no objection to the other Swiss reservation, which -- like Austria's reservation on its ratification of the BTWC on 10 August 1973 -- alluded to the obligations arising from its status of permanent neutrality, and noted that this status would limit what it was able to do as a State Party to the BTWC, especially under Article VII or any similar or supplementary arrangement for collective assistance. Austria's reservation added a reference to its UN membership.<sup>23</sup>

19. This Swiss reservation to which the United States objected had to do with the second part of the prohibition in Article I of the BTWC --*weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict*. Switzerland reserved the right to decide for itself what this prohibition covered, because of the problems that Switzerland foresaw in defining the scope of the Convention as Switzerland considered that it would be hard to distinguish weapons, equipment or means of delivery specifically designed for the use of biological agents and toxins from other weapons, equipment or means of delivery which might be used legitimately by armed forces.<sup>24</sup> The United States, while

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<sup>21</sup>United Nations, *Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament on its work during the period 16 January to 1 February 1990*, CD/961, 1 February 1990, p.198.

<sup>22</sup>Jozef Goldblat, *Arms Control: A Survey and Appraisal of Multilateral Agreements*, Taylor & Francis for SIPRI, London, 1978, p.194.

<sup>23</sup>Jozef Goldblat, *Arms Control: A Survey and Appraisal of Multilateral Agreements*, Taylor & Francis for SIPRI, London, 1978, p.193.

<sup>24</sup>Martin Muller, Private communication, Federal Department of Foreign Affairs, Bern, Switzerland, 16 August 1999.

conceding the uncertainty, objected that it did not constitute sufficient reason for States to reserve unilaterally the right to decide which weapons, equipment or means of delivery fell within the definition.<sup>25</sup>

20. On balance, however, it is highly desirable that the language in the BTWC Protocol send a clear signal to governments that reservations are unacceptably damaging. Only this suffices to ensure that all eventual States Parties do enter into the same set of obligations. The preferred option is thus a comprehensive overall ban on reservations *The Articles of and the Annexes and Appendices to this Protocol shall not be subject to reservations.* To try to distinguish between the Articles and the Annexes and Appendices is to undermine Article XVI of the Protocol which specifically states that *Any reference to this Protocol includes the Annexes and the Appendices.*

21. In addition, in the light of the CWC experience, there would be benefit in adding language similar to that being considered<sup>26</sup> in 1989 - 90 for the CWC to the effect that:

1. *No reservations or exceptions, however phrased or named, [including interpretative statements or declarations], may be made to this Convention [unless expressly permitted by other provisions of the Convention].*

2. *The provision in paragraph 1 above does not preclude a State when signing, ratifying or acceding to this Convention, from making statements or declarations, however phrased or named, provided that such statements or declarations do not purport to exclude or to modify the legal effect of the provisions of this Convention in their application to that State.*

22. The latter part of paragraph 2 in the draft CWC text above echoes the definition of *reservation* in Article 2.1 (d) of the 1969 Vienna Convention on the Law of Treaties<sup>27</sup>:

*(d) 'reservation' means a unilateral statement, however phrased or named, made by a State when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State;*

23. For the BTWC Protocol, it would be prudent to draw on the same definition, to show what needs to be prevented, whether a formal reservation or another device is used; and to add the word *conditions* in order to signal clearly that the ban on reservations is not to be circumvented by adding conditions either. The following sentence is therefore recommended to be added to Article XXI:

*In addition, no exceptions or conditions, however phrased or named, including interpretative statements or declarations, which purport to exclude or modify the legal effect of the provisions of the Articles and the Annexes and Appendices of this*

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<sup>25</sup>Jozef Goldblat, *Arms Control: A Survey and Appraisal of Multilateral Agreements*, Taylor & Francis for SIPRI, London, 1978, p.194.

<sup>26</sup>United Nations, *Report of the Ad Hoc Committee on Chemical Weapons to the Conference on Disarmament on its work during the period 16 January to 1 February 1990*, CD/961, 1 February 1990, p.198.

<sup>27</sup>*Vienna Convention on the Law of Treaties.* Available at <http://www.tufts.edu/departments/fletcher/multi/texts/BH408.txt>

*Protocol in their application to any State, may be made by any State upon signing, ratifying or acceding to this Protocol.*

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

24. Our view is that Article XXI should be based on a comprehensive overall ban on reservations as follows:

#### *ARTICLE XXI*

#### *RESERVATIONS*

*~~{The Articles of this Protocol [shall not be subject to reservations] [incompatible with its object and purpose or that of the Biological and Toxin Weapons Convention of 1972]. and the Annexes and Appendices of this Protocol shall not be subject to reservations. incompatible with its object and purpose or that of the Biological and Toxin Weapons Convention of 1972.}~~ In addition, no exceptions or conditions, however phrased or named, including interpretative statements or declarations, which purport to exclude or modify the legal effect of the provisions of the Articles and the Annexes and Appendices of this Protocol in their application to any State, may be made by any State upon signing, ratifying or acceding to this Protocol.*