

ARTICLE XIV: AMENDMENTS

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 concluded¹ that *"the majority of the Articles in the draft Protocol have now reached the stage when they have had multiple readings and are unlikely to change significantly during the coming months as the negotiations enter the end-game. It is therefore timely to commence the production of a series of Evaluation Papers which will consider Article by Article the current state of each Article of the Protocol."* By the end of 1999, Evaluation Papers had been prepared for 14 of the 23 Articles, over half of all the Articles of the Protocol. This Evaluation Paper continues this series by considering Article XIV *Amendments* on which the AHG has made progress with the current rolling text containing four sets of square brackets.

Article XIV

3. In October 1999, the text² for Article XIV was unchanged from its earlier versions, which had last been significantly amended in January 1999 when the text³ included paragraph 5 *bis* proposed by South Africa in WP. 327, and was as follows:

ARTICLE XIV

AMENDMENTS

[1. Any time after the entry into force of this Protocol any State Party may propose amendments to this Protocol or its Annexes or Appendices. Any State Party may also propose changes, in accordance with paragraph 4, to the Annexes and Appendices of this Protocol. Proposals for amendment shall be subject to the

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

²United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/47 (Part I), 15 October 1999, Geneva.

³United 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/44 (Part I), 29 January 1999, Geneva.

procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the provisions set out in paragraph 5.

2. Any proposal for an amendment shall be communicated to the Director-General. The proposed amendment shall be considered only by an Amendment Conference. The Director-General shall circulate the proposal to all States Parties and seek their views on whether an Amendment Conference should be convened to consider the proposal. If one-third or more of the States Parties notify the Director-General, not later than 30 days after the circulation of the proposal, that they support the convening of an Amendment Conference, the Director-General shall convene such a Conference to which all States Parties shall be invited. The Amendment Conference shall be held immediately following a regular session of a Conference of States Parties unless all States Parties which support the convening of an Amendment Conference request that it be held earlier. In no case shall an Amendment Conference be held sooner than 60 days after the circulation of the proposed amendment. Amendments shall be adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote.

[3. Amendments shall enter into force for all States Parties 30 days after the deposit of the instruments of ratification or acceptance by all of the States Parties casting a positive vote at the Amendment Conference.]

4. In order to assure the viability and effectiveness of this Protocol, provisions in sections ... of the Annexes and Appendices shall be subject to changes in accordance with paragraph 5, if proposed changes are related only to matters of a technical or administrative nature. Sections ... of the Annexes or Appendices shall not be subject to changes in accordance with paragraph 5.

5. Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:

(a) The text of the proposed changes, together with supporting documentation, shall be transmitted to the Director-General. The Director-General shall promptly communicate any such proposal to all States Parties and the Executive Council. Any State Party and the Director-General may provide additional information to assist in the evaluation of the proposal;

(b) Not later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions and implementation of this Protocol and for the provisions and implementation of the Biological and Toxin Weapons Convention of 1972 and shall communicate any such information to all States Parties and the Executive Council;

(c) The Executive Council shall examine the proposal in light of all the information available to it, including whether the proposal fulfils the requirements of paragraph 4. Not later than 90 days after its receipt, the Executive Council shall notify its recommendations, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

(d) *If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;*

(e) *If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether the proposal fulfils the requirements of paragraph 4, shall be taken as a matter of substance by a Conference of States Parties at its next session;*

(f) *The Director-General shall notify all States Parties of any decision under this paragraph;*

(g) *Changes approved under this procedure shall enter into force for all States Parties 180 days after the day of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by a Conference of States Parties.]*

[5 bis Amendments to the list of agents and toxins contained in Annex A shall be considered by the Conference of States Parties in accordance with the following procedures:

[(a) The criteria for inclusion or exclusion of an agent or toxin to the list of agents and toxins shall be agreed by the first Conference of States Parties;]

(b) Proposed additions or deletions to the list together with supporting documentation and evaluation against the criteria, shall be transmitted to the Director-General. The Director-General shall promptly communicate the proposal to all States Parties;

(c) The proposal shall be considered by the first following Conference of States Parties. Additions and deletions shall be adopted by the Conference by a positive vote of a majority of all States Parties present and voting, with no State Party casting a negative vote.]

4. In respect of paragraph 5 *bis* it should also be noted that there is language in *Annex A Declarations I. Lists and Criteria (Agents and Toxins)* that states:

*[2. The Executive Council may review the list of agents and toxins to ensure it remains effective and operational. Any State Party may propose modifications to the list. The Executive Council shall review any proposed modifications to the lists of agents and toxins. Any changes to the list shall be made in accordance with Article XIV.]**

* The view was expressed that review of and change to the list shall be addressed in Article III, section A and Article XIV.

Finally, in *Article III Compliance Measures A [Lists and Criteria (Agents and Toxins)]* there is language, within further square brackets:

[...2. The Conference of States Parties shall, taking into account scientific and technical achievements and in accordance with the criteria contained in Annex A, section I, examine proposals whereby microbiological or other biological agents and toxins are to be included in or excluded from the lists, and shall take a decision thereon.]

5. The ~~striketrough~~ version of Article XIV provided⁴ in Part II by the FOC on Legal Issues for further consideration proposes is identical apart from the following changes:

- a. The brackets at the start of paragraph 1 and at the end of paragraph 5 are deleted.
- b. The brackets around paragraph 3 are deleted.
- c. In paragraph 5 (b) the words *Biological and Toxin Weapons Convention of 1972* are ~~struckthrough~~ and replaced by the word **Convention**.
- d. Paragraph 5 *bis* continues in square brackets.

6. A revised ~~striketrough~~ version⁵ of Article XIV was prepared by the Friend of the Chair following informal consultations during the November/December 1999 AHG session. This proposes modified language for paragraphs 1, 4 and 5 (c) which would read as follows:

~~f1.~~ Any time after the entry into force of this Protocol any State Party may propose amendments to this Protocol or its Annexes or Appendices. Any State Party may also propose changes, in accordance with paragraph 4, to ~~the Annexes and Appendices of this Protocol~~ **specified parts of this Protocol or its Annexes or Appendices**. Proposals for amendment shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the provisions set out in paragraph 5.

4. In order to assure the viability and effectiveness of this Protocol, provisions in ~~sections ... of the Annexes and Appendices~~ **the Appendices, sections ... of the Annexes and those sections of Article III(D) which are identified in that Article as being subject to this paragraph**, shall be subject to changes in accordance with paragraph 5, if ~~the~~ proposed changes are related only to matters of a technical or administrative nature. Sections ... of the Annexes ~~or Appendices~~ shall not be subject to changes in accordance with paragraph 5.

5...

(c) The Executive Council shall examine the proposal, **including whether the proposal fulfils the requirements of paragraph 4**, in the light of all the information available to it, ~~including whether the proposal fulfils the requirements of paragraph 4~~, **and any specific guidelines or criteria for review specified in the Article, Annex**

⁴United Nations, *Proposals for further consideration by the Friend of the Chair on Legal Issues*, BWC/AD HOC GROUP/FOC/28, 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/47 (Part II), 20 October 1999, Geneva.

⁵United 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/49/Add. 3, 15 December 1999, Geneva.

or Appendix to which the change is proposed. Not later than 90 days after its receipt, the Executive Council shall notify its recommendations, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

The principal change proposed in this latest ~~strike through~~ version of Article XIV is to extend the provision for changes of a technical or administrative nature only in the Annexes and Appendices to the Protocol to specified parts of the Protocol itself.

Evaluation

7. Amendment procedures provide an agreed mechanism for altering the provisions of a treaty should this be deemed necessary by the States Parties. Although an important element in a treaty, amendment is not envisaged as something which will be undertaken frequently as adoption of an amendment will generally require instruments of ratification or acceptance to be deposited by States Parties. It may also be destabilizing to a treaty for some States Parties to adhere to the treaty as amended and others to the unamended treaty, because this introduces two sets of obligations within the same treaty.

8. This has long been an argument against formally amending the BTWC, unless there could be certainty that any amendment introduced under Article XI would secure universal acceptance. Otherwise, it might, in the words of the Final Declaration⁶ of the Fourth Review Conference "*affect the universality of the Convention.*"

9. The Protocol, however, is not open to the same objection. This is because it has its own identity, as a legally binding instrument separate from the Convention. While it is highly desirable that the list of States Parties to the Protocol should, from an early date, approximate as closely as possible to that of the BTWC itself, it is accepted that this will not happen straight away; and that in the meantime the Protocol can be allowed to enter into force without destabilizing the Convention which it is, on the contrary, designed to strengthen. Strong evidence for the acceptance of these two propositions is found in the fact that none of the alternative proposals for *Article XX Entry into Force* -- see our Evaluation Paper No. 5⁷ -- requires ratification by **all** the States Parties to the BTWC as a condition for the Protocol to enter into force.

10. The contingency, outlined in paragraph 7 above, with its attendant risk of introducing two sets of obligations, is, however, prevented in regard to amendment of the Protocol by the modern international practice recommended for the BTWC Protocol, whereby any amendment enters into force for all States Parties or for none -- see paragraphs 23 and 24 below. Where treaties contain detailed technical elements such as lists of materials or of national facilities, then a simplified amendment procedure may be incorporated in the treaty so as to make changes to carefully specified and limited parts of the treaty easier to effect, with less delay than the full amendment procedure might impose.

⁶United 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. 26.

⁷Graham 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>

11. The Vienna Convention on the Law of Treaties⁸ makes the following provisions

5. AMENDMENT AND MODIFICATION OF TREATIES

Article 39

General rule regarding the amendment of treaties

A treaty may be amended by agreement between the parties. The rules laid down in Part II apply to such an agreement except in so far as the treaty may otherwise provide.

Article 40

Amendment of multilateral treaties

1. Unless the treaty otherwise provides, the amendment of multilateral treaties shall be governed by the following paragraphs.

2. Any proposal to amend a multilateral treaty as between all the parties must be notified to all the contracting States, each one of which shall have the right to take part in:

(a) the decision as to the action to be taken in regard to such proposal;

(b) the negotiation and conclusion of any agreement for the amendment of the treaty.

3. Every State entitled to become a party to the treaty shall also be entitled to become a party to the treaty as amended.

4. The amending agreement does not bind any State already a party to the treaty which does not become a party to the amending agreement; article 30, paragraph 4(b), applies in relation to such State.

5. Any State which becomes a party to the treaty after the entry into force of the amending agreement shall, failing an expression of a different intention by that State:

(a) be considered as a party to the treaty as amended; and

(b) be considered as a party to the unamended treaty in relation to any party to the treaty not bound by the amending agreement.

Article 41

Agreements to modify multilateral treaties between certain of the parties only

1. Two or more of the parties to a multilateral treaty may conclude an agreement to modify the treaty as between themselves alone if:

⁸ *Vienna Convention on the Law of Treaties*, available at <http://www.tufts.edu/departments/fletcher/multitexts/BH.538.txt>

(a) the possibility of such a modification is provided for by the treaty;

or

(b) the modification in question is not prohibited by the treaty and:

(i) does not affect the enjoyment by the other parties of their rights under the treaty or the performance of their obligations;

(ii) does not relate to a provision, derogation from which is incompatible with the effective execution of the object and purpose of the treaty as a whole.

2. Unless in a case falling under paragraph 1(a) the treaty otherwise provides, the parties in question shall notify the other parties of their intention to conclude the agreement and of the modification to the treaty for which it provides.

12. It should be noted that Article 40, paragraph 4, corresponds to the practice of the BTWC, set out below, and other treaties of its time, in assuming that treaties will normally provide for an amendment to enter into force only for those States Parties which individually accept it. The modern international practice, envisaged for the BTWC Protocol, whereby an amendment supported by a sufficient majority becomes binding on **all** States Parties when it comes into force is covered by the proviso "*Unless the treaty otherwise provides*" in Article 40, paragraph 1, of the Vienna Convention on the Law of Treaties.

13. Provisions for amendment are provided in the BTWC as Article XI:

ARTICLE XI

Any State Party may propose amendments to this Convention. Amendments shall enter into force for each State Party accepting the amendments upon their acceptance by the majority of States Parties to the Convention and thereafter for each State Party on the date of acceptance by it.

14. A formal proposal was put forward at the Fourth Review Conference in 1996 by Iran to amend the title and Article I of the Convention so as to include explicitly the prohibition of use of biological weapons. The Final Declaration⁹ stated in respect of Article XI that:

Article XI

1. The Conference notes that the Islamic Republic of Iran has formally presented a proposal to amend Article I and the title of the Convention to include explicitly the prohibition of use of biological weapons.

2. The Conference notes that the Depositaries are notifying all States Parties of the proposal. The Conference encourages all States Parties to convey their views to the Depositaries on whether the Convention needs to be amended to make clear explicitly that the use of biological weapons is effectively prohibited.

⁹ 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. 26.

3. *The Conference requests the Depositaries to take such measures as may be requested by a majority of States Parties, including the option of convening a conference open to all States Parties to the Convention at the earliest appropriate opportunity to take a decision on the proposal, should a majority of the States Parties so decide.*

4. *The Conference meanwhile reaffirms the importance of Article XI. In this context the Conference underlines that the provisions of Article XI should in principle be implemented in such a way as not to affect the universality of the Convention.*

15. Elsewhere in the Final Declaration, the States Parties reemphasized their determination to prohibit the use of biological weapons. They achieved this in three different places: first, by the language adopted in respect of the Preamble to the Final Declaration which stated:

*Their reaffirmation that under any circumstances the **use, development, production and stockpiling of bacteriological (biological) and toxin weapons is effectively prohibited under Article I of the Convention.***

*Their continued determination, for the sake of mankind, **to exclude completely the possibility of the use of bacteriological (biological) agents and toxins as weapons, and their conviction that such use would be repugnant to the conscience of mankind;***

*Their recognition that purposes of this **Convention include the prohibition of the use of biological weapons as contrary to the purpose of the Convention;**[Emphasis added]*

Then under Article I

3. *The Conference reaffirms that **the use by the States Parties, in any way and under any circumstances, of microbial or other biological agents or toxins, that is not consistent with prophylactic, protective or other peaceful purposes, is effectively a violation of Article I of the convention***

4. *The Conference reaffirms the undertaking in Article I never in any circumstances to develop, produce, stockpile or otherwise acquire or retain weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict, **in order to exclude completely and forever the possibility of their use.**[Emphasis added]*

and under Article IV

7. *The Conference reaffirms that **under all circumstances the use of bacteriological (biological) and toxin weapons is effectively prohibited by the Convention.***
[Emphasis added]

16. It was thus clear that the States Parties to the Convention in their Final Declaration at the Fourth Review Conference had underlined their appreciation that the Convention prohibits the use of bacteriological (biological) and toxin weapons under all circumstances. Under the circumstances, the majority required for the convening of a conference to take a decision on the proposed amendment was not forthcoming.

17. Provision for amendment is made in the Chemical Weapons Convention (CWC)¹⁰ in Article XV:

ARTICLE XV

AMENDMENTS

1. Any State Party may propose amendments to this Convention. Any State Party may also propose changes, as specified in paragraph 4, to the Annexes of this Convention. Proposals for amendments shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the procedures in paragraph 5.

2. The text of a proposed amendment shall be submitted to the Director-General for circulation to all States Parties and to the Depositary. The proposed amendment shall be considered only by an Amendment Conference. Such an Amendment Conference shall be convened if one third or more of the States Parties notify the Director-General not later than 30 days after its circulation that they support further consideration of the proposal. The Amendment Conference shall be held immediately following a regular session of the Conference unless the requesting States Parties ask for an earlier meeting. In no case shall an Amendment Conference be held less than 60 days after the circulation of the proposed amendment.

3. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all the States Parties referred to under subparagraph (b) below:

(a) When adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote; and

(b) Ratified or accepted by all those States Parties casting a positive vote at the Amendment Conference.

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.

5. Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:

¹⁰Organization 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>

(a) The text of the proposed changes shall be transmitted together with the necessary information to the Director-General. Additional information for the evaluation of the proposal may be provided by any State Party and the Director-General. The Director-General shall promptly communicate any such proposals and information to all States Parties, the Executive Council and the Depositary;

(b) Not later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions of this Convention and its implementation and shall communicate any such information to all States Parties and the Executive Council;

(c) The Executive Council shall examine the proposal in the light of all information available to it, including whether the proposal fulfils the requirements of paragraph 4. Not later than 90 days after its receipt, the Executive Council shall notify its recommendation, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

(d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether it fulfils the requirements of paragraph 4, shall be taken as a matter of substance by the Conference at its next session;

(f) The Director-General shall notify all States Parties and the Depositary of any decision under this paragraph;

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

and in the Comprehensive Test Ban Treaty (CTBT)¹¹ as Article VII:

ARTICLE VII

AMENDMENTS

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

1. At any time after the entry into force of this Treaty, any State Party may propose amendments to this Treaty, the Protocol, or the Annexes to the Protocol. Any State Party may also propose changes, in accordance with paragraph 7, to the Protocol or the Annexes thereto. Proposals for amendments shall be subject to the procedures in paragraphs 2 to 6. Proposals for changes, in accordance with paragraph 7, shall be subject to the procedures in paragraph 8.

2. The proposed amendment shall be considered and adopted only by an Amendment Conference.

3. Any proposal for an amendment shall be communicated to the Director-General, who shall circulate it to all States Parties and the Depositary and seek the views of the States Parties on whether an Amendment Conference should be convened to consider the proposal. If a majority of the States Parties notify the Director-General no later than 30 days after its circulation that they support further consideration of the proposal, the Director-General shall convene an Amendment Conference to which all States Parties shall be invited.

4. The Amendment Conference shall be held immediately following a regular session of the Conference unless all States Parties that support the convening of an Amendment Conference request that it be held earlier. In no case shall an Amendment Conference be held less than 60 days after the circulation of the proposed amendment.

5. Amendments shall be adopted by the Amendment Conference by a positive vote of a majority of the States Parties with no State Party casting a negative vote.

6. Amendments shall enter into force for all States Parties 30 days after deposit of the instruments of ratification or acceptance by all those States Parties casting a positive vote at the Amendment Conference.

7. In order to ensure the viability and effectiveness of this Treaty, Parts I and III of the Protocol and Annexes 1 and 2 to the Protocol shall be subject to changes in accordance with paragraph 8, if the proposed changes are related only to matters of an administrative or technical nature. All other provisions of the Protocol and the Annexes thereto shall not be subject to changes in accordance with paragraph 8.

8. Proposed changes referred to in paragraph 7 shall be made in accordance with the following procedures

:

(a) The text of the proposed changes shall be transmitted together with the necessary information to the Director-General. Additional information for the evaluation of the proposal may be provided by any State Party and the Director-General. The Director-General shall promptly communicate any such proposals and information to all States Parties, the Executive Council and the Depositary;

(b) No later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions of this Treaty and its implementation and shall communicate any such information to all States Parties and the Executive Council;

(c) The Executive Council shall examine the proposal in the light of all information available to it, including whether the proposal fulfils the requirements of paragraph 7. No later than 90 days after its receipt, the Executive Council shall notify its recommendation, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;

(d) If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under sub-paragraph (d), a decision on the proposal, including whether it fulfils the requirements of paragraph 7, shall be taken as a matter of substance by the Conference at its next session;

(f) The Director-General shall notify all States Parties and the Depositary of any decision under this paragraph;

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the date of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by the Conference.

18. **Analysis.** In the CWC there is thus a simplified amendment procedure to make changes to provisions in the Annexes to the CWC which are of an administrative or technical nature only. This procedure will apply to **all** changes to the Annex on Chemicals. However, changes to certain specified areas in other Annexes shall **not** be made by this simplified procedure. Likewise in the CTBT there is a similar simplified amendment procedure for changes of an administrative or technical nature only to certain specified elements in the Protocol to the CTBT, namely to Parts I and III of the Protocol addressing the International Monitoring System and International Data Centre functions and Confidence-Building Measures respectively and Annexes 1 and 2 to the Protocol which in Annex 1 provides detailed lists for example of the seismological stations comprising the primary network whilst Annex 2 is a list of the characterization parameters for International Data Centre standard event screening. Changes to all other provisions of the Protocol and the Annexes thereto shall **not** be made by this simplified procedure.

19. It is consequently convenient to divide the evaluation of Article XIV of the Protocol into three parts: the amendment of the Protocol, changes to specified Annexes and Appendices which are only of a technical or administrative nature and a simpler amendment procedure for the list of agents and toxins.

Amendment of the BTWC Protocol

20. The language in paragraph 1 provides for any State Party to the Protocol to propose an amendment to any part of the Protocol. Amendments shall be subjected to the procedures in paragraphs 2 and 3 whilst proposals for changes, as specified in paragraph 4 shall be subjected to the provisions set out in paragraph 5. Changes are addressed in the next section of this Evaluation Paper.

21. Paragraph 1 is essentially identical to the language in the corresponding paragraph 1 of the CWC Article XV and paragraph 1 of the CTBT Article VII. The latest proposed ~~strike through~~ version of the Protocol Article XIV extends proposals for changes, in accordance with paragraph 4, to *specified parts of this Protocol* as well as *its Annexes or Appendices*.

22. Paragraph 2 has language which, although differently structured, has the same substantive effect as that in paragraph 2 and subparagraph 3 (a) of the CWC Article XV and that in paragraphs 2 to 5 of the CTBT Article VII.

23. Paragraph 3, currently within additional square brackets, corresponds to paragraph 3 of the CWC Article XV and to paragraph 6 of the CTBT Article VII. It is noted that in all three cases, the amendment enters into force for **all** States Parties, whether or not they have taken part in the Amendment Conference, 30 days after the deposit of instruments of ratification or acceptance by all States Parties casting a positive vote at the Amendment Conference. The logic of this provision is that any State Party which does not wish to be bound by the proposed amendment must veto it by casting a negative vote at the Amendment Conference. Those which do not attend, or which attend but abstain on the vote, risk becoming bound by the amendment by default if it satisfies the conditions for entry into force; in the negotiation of the CWC, such States Parties were recognized as "*those which can live with the proposal or who are indifferent*".¹² This provision differs fundamentally from the BTWC Article XI because, under that Article, any amendment of the BTWC, however large the majority in favour of it, enters into force only for those States Parties which individually accept it. It could be destabilizing for the BTWC if some States Parties adhered to the Convention as amended and others to the unamended Convention (see paragraphs 7 to 10 above).

24. **Analysis.** The provisions for amendment of the Protocol are thus the same as those within the CWC and the CTBT. Insofar as all three provisions differ from Article XI of the BTWC, the difference marks an advance in international practice over an earlier era in which mutual distrust made for perhaps excessive procedural caution, and the new international practice is therefore to be commended. The danger of an amendment introducing two sets of obligations within the same treaty regime is averted by ensuring that any amendment enters into force for **all** States Parties or for none.

Changes only of a technical or administrative nature to specified Annexes and Appendices

25. Paragraph 4 addresses changes to specified sections of the Annexes and Appendices of the Protocol so long as the proposed changes relate **only** to changes of a technical or administrative nature. Paragraph 5 elaborates the procedures to be followed for such changes. Certain other specified sections of the Annexes and Appendices shall not be subject to this change procedure. This language closely reflects that in paragraph 4 of the CWC Article XV which addresses changes to the Annexes to the CWC so long as these proposed changes

¹²Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht, Martinus Nijhoff, 1994, p.243.

relate **only** to changes of a technical or administrative nature. Paragraph 5 elaborates the procedures to be followed for such changes. The CWC specifies that **all** changes to the Annex on Chemicals shall be made by the procedure in paragraph 5. It further specifically excludes from this procedure any changes to Sections A and C of the Confidentiality Annex, Part X (relating to Challenge Inspections) of the Verification Annex, and those definitions in Part I of the Verification Annex which relate exclusively to challenge inspections. Likewise, the BTWC Protocol language reflects that in paragraph 7 of the CTBT Article VII which addresses changes to Parts I and III of the Protocol and to Annexes 1 and 2 of the Protocol so long as the changes relate **only** to changes of a technical or administrative nature. Paragraph 8 elaborates the procedures to be followed for such changes. There is no analogous provision to that within the CWC whereby **all** changes to a specific Annex are to be made by the change procedure. The CTBT specifically excludes from this procedure any changes to **all other** provisions of the Protocol and the Annexes thereto. The latest ~~strike~~ version of the Protocol paragraph 4 reorders and extends the provisions which will be subject to changes in accordance with paragraph 5 to *the Appendices, sections ... of the Annexes and those sections of Article III (D) which are identified in that Article as being subject to this paragraph*. Furthermore, in this version the exclusion from changes in accordance with paragraph 5 is tightened to specified sections of the Annexes.

26. This extension in the latest ~~strike~~ version¹³ to *those sections of Article III (D)* reflects the proposed change to paragraph 2 of Article III D. Declarations I. Submission of Declarations as follows:

~~*[2. The Executive Council may review periodically the declaration formats' structure and contents to ensure the effective implementation and operation of Article III, section D. Any State Party may propose modifications to the declaration formats which shall be subjected to review by the Executive Council. In reviewing the declaration formats, the Executive Council shall consider, inter alia, scientific and technological developments that may affect their operational structure and contents.]*~~

2. The technical aspects of the declaration requirements set out in paragraphs ... to ... below, in particular the numerical values specified, shall be subject to change in accordance with Article XIV paragraph 4. In considering any proposed change, the Executive Council shall consider, inter alia, the effective implementation and operation of the declaration provisions and any scientific and technological developments that may affect this.

This proposed change is welcomed as it recognizes that some of the technical aspects of the declaration requirements set out in Article III (D) may require change to reflect scientific and technological developments.

27. It is worth noting that the actual experience under the CWC in applying its procedure to introduce changes has been distinctly mixed. Within six months of the entry into force of the CWC on 29 April 1997, Canada in September 1997 drew the attention of the Fifth Session of the OPCW Executive Council to the problems caused by the need to give 30 days' notice of the transfer of bioassay kits containing microgramme quantities of saxitoxin, which appears in the list of Schedule 1 chemicals. Subsequently, further problems were identified

¹³United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/49/Add. 3, 15 December 1999, Geneva.

associated with the limitation of the export of such kits only to other States Parties and the prohibition of re-transfers to third parties. Such kits are needed to diagnose the presence of Paralytic Shell Poisoning (PSP), which occurs globally in some 30 or so countries, and, in a tritiated form, for electrophysiological research.^{14 15} There was thus the prospect that the CWC could come to be seen as losing credibility if it was seen to be restricting humanitarian activities especially when it is recognised that the microgramme quantities of saxitoxin pose no measurable risk to the Convention. A draft decision, reflecting extensive consultation, was placed before the Eighth Session of the Executive Council in January 1998 proposing that the 30 day prior notification of such transfers be suspended but this was rejected. A second draft decision proposing that re-transfers below an upper limit of 5 milligrammes should be permitted was also placed before the Eighth Session and was also rejected.

28. Eventually, the Executive Council at its meetings in October 1998 and April 1999 adopted decisions EC-XII/DEC. 5 and EC-XV/DEC.5 entitled "Transfers of saxitoxin for medical/diagnostic purposes" which decided¹⁶ that *in relation to the small transfers of saxitoxin for medical/diagnostic purposes when strict observance of the 30 day advance notification requirement would prevent meeting a specific public health need an interim practical guideline which should apply for 270 days pending an amendment or change to the Convention, making these measures consistent with its provisions, is adopted pursuant to Article XV of the Convention.* On 13 November 1998, Canada submitted, in accordance with paragraphs 4 and 5 of Article XV of the Convention, the following proposal in respect to transfers of the Schedule 1 chemical saxitoxin. This proposed change was to add a new paragraph 5 *bis* to Section B of Part VI of the Verification Annex to the Convention to read:

"For quantities of 5 milligrams or less, the Schedule 1 chemical saxitoxin shall not be subject to the notification period in paragraph 5 if the transfer is for medical/diagnostic purposes. In such case the notification shall be made at the time of transfer."

This change, following the procedure specified in paragraph 5 of Article XV of the CWC, entered into force for all States Parties on 31 October 1999.

29. The problem about retransfer of similar small quantities of tritiated saxitoxin has not been resolved. Although a draft decision was put forward to deal with this, it was withdrawn when it became clear that consensus was not going to be forthcoming. Even though the retransfer of 5 milligrammes or less of saxitoxin presents no credible risk to the Convention, it seems that some may not have regarded this as meeting the proviso that *changes are related only to matters of an administrative or technical nature* and have sought to argue that this second proposed change should instead be regarded as an amendment to the Convention, and should accordingly be subject to the full amendment procedure under paragraphs 2 and 3 of Article XV.

30. The procedure elaborated in paragraph 5 mirrors closely the corresponding procedure in paragraph 5 of the CWC Article XV and in paragraph 8 of the CTBT Article VII with one

¹⁴Daniel Feakes, *Developments in the Organization for the Prohibition of Chemical Weapons*, Quarterly Review no 20, *CBW Conventions Bulletin*, issue no 38, December 1997, p.9

¹⁵Graham H. Cooper, *Saxitoxin -- A Cautionary Tale*, Supplement to the Proceedings from the 6th CBW Protection Symposium, Stockholm, Sweden, May 10 - 15 1998, Appendix, pp. 57-61.

¹⁶Lisa Woollomes Tabassi, *OPCW: The Legal Texts*, Organization for the Prohibition of Chemical Weapons, TMC Asser Press, The Hague, 1999, pp.163-164.

difference. In both the CWC and the CTBT, the requirement is for the Director-General to promptly communicate any proposed changes to all States Parties, the Executive Council and the Depositary and, again later in the paragraph, the Director-General is required to notify all States Parties and the Depositary of any decision. The proposed new language in the latest ~~striketrough~~ version¹⁷ of paragraph 5 (c):

*(c) The Executive Council shall examine the proposal, **including whether the proposal fulfils the requirements of paragraph 4**, in the light of all the information available to it, ~~including whether the proposal fulfils the requirements of paragraph 4~~, and any specific guidelines or criteria for review specified in the Article, Annex or Appendix to which the change is proposed. Not later than 90 days after its receipt, the Executive Council shall notify its recommendations, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;*

adds the requirement that the Executive Council shall consider the proposal in the light of any specific guidelines or criteria for review specified in the Article, Annex or Appendix to which the change is proposed.

31. **Analysis.** Article XIV of the Protocol in paragraph 4 does not yet specify, even in square brackets, which sections of the Annexes and Appendices shall or shall not be subject to the change procedure. Taking the CWC as a model, it would seem to be logical to enable changes to the Annexes and Appendices to follow the procedure in paragraph 5 so long as they relate **only** to changes of a technical or administrative nature. It would, likewise, be logical to exclude from this procedure any changes to Annex C [*Measures to strengthen the implementation of Article III*], to Annex D *Investigations* or to Section I *General principles for the handling of confidential information* of Annex E *Confidentiality Provisions*. The latest ~~striketrough~~ version with its extension to allow specified sections of the Protocol to be subject to changes in accordance with paragraph 4 is welcomed as this recognizes that some of the technical aspects of the declaration requirements set out in Article III (D) may require change to reflect scientific and technological developments.

32. Insofar as paragraph 5 is concerned, our view is that this should, both in paragraph 5(a) and 5(f), also include the Depositary/ies.

Amendment of the list of agents and toxins

33. The language in paragraph 5 *bis* essentially provides for an intermediate procedure for amendments to the list of agents and toxins contained in Annex A. It requires proposed additions or deletions, together with supporting documentation and evaluation against the criteria, to be transmitted to the Director-General, who then communicates the proposal to the States Parties. A decision will then be taken by the next Conference of the States Parties by a positive vote of a majority of all States Parties present and voting, with no State Party casting a negative vote. There is no parallel intermediate procedure in either the CWC or the CTBT although, from a point of view of an amendment to a list of materials, the changes to the Annex of Chemicals in the CWC is probably the closest analogy.

¹⁷United 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/49/Add. 3, 15 December 1999, Geneva.

34. Before analysing the language in 5 *bis*, it should be recalled that under the CWC it is specified that **all** changes to the Annex on Chemicals shall be made by the procedure in paragraph 5. The Annex on Chemicals in the CWC is made up of both guidelines for the Schedules of Chemicals and the lists of chemicals under the Schedules.

A. GUIDELINES FOR SCHEDULES OF CHEMICALS

Guidelines for Schedule 1

1. *The following criteria shall be taken into account in considering whether a toxic chemical or precursor should be included in Schedule 1:*

(a) It has been developed, produced, stockpiled or used as a chemical weapon as defined in Article II;

(b) It poses otherwise a high risk to the object and purpose of this Convention by virtue of its high potential for use in activities prohibited under this Convention because one or more of the following conditions are met:

(i) It possesses a chemical structure closely related to that of other toxic chemicals listed in Schedule 1, and has, or can be expected to have, comparable properties;

(ii) It possesses such lethal or incapacitating toxicity as well as other properties that would enable it to be used as a chemical weapon;

(iii) It may be used as a precursor in the final single technological stage of production of a toxic chemical listed in Schedule 1, regardless of whether this stage takes place in facilities, in munitions or elsewhere;

(c) It has little or no use for purposes not prohibited under this Convention.

Guidelines for Schedule 2

2. *The following criteria shall be taken into account in considering whether a toxic chemical not listed in Schedule 1 or a precursor to a Schedule 1 chemical or to a chemical listed in Schedule 2, part A, should be included in Schedule 2:*

(a) It poses a significant risk to the object and purpose of this Convention because it possesses such lethal or incapacitating toxicity as well as other properties that could enable it to be used as a chemical weapon;

(b) It may be used as a precursor in one of the chemical reactions at the final stage of formation of a chemical listed in Schedule 1 or Schedule 2, part A;

(c) It poses a significant risk to the object and purpose of this Convention by virtue of its importance in the production of a chemical listed in Schedule 1 or Schedule 2, part A;

(d) It is not produced in large commercial quantities for purposes not prohibited under this Convention.

Guidelines for Schedule 3

3. *The following criteria shall be taken into account in considering whether a toxic chemical or precursor, not listed in other Schedules, should be included in Schedule 3:*

(a) It has been produced, stockpiled or used as a chemical weapon;

(b) It poses otherwise a risk to the object and purpose of this Convention because it possesses such lethal or incapacitating toxicity as well as other properties that might enable it to be used as a chemical weapon;

(c) It poses a risk to the object and purpose of this Convention by virtue of its importance in the production of one or more chemicals listed in Schedule 1 or Schedule 2, part B;

(d) It may be produced in large commercial quantities for purposes not prohibited under this Convention.

35. **Analysis.** The consequence of a change to the list of chemicals in the Schedules to the CWC – or of a change to the guidelines – because of the consequential requirement both for detailed declarations and routine inspections is much more significant than a change to the list of agents and toxins in the Annex of the BTWC Protocol. This Annex differs fundamentally from the Schedules to the CWC because the CWC verification regime architecture is specifically structured around the Schedules. These determine explicitly the declaration, routine inspection and transfer regimes to be applied to the specific chemicals falling within the three Schedules and the Discrete Organic Chemicals. In contrast, the BTWC Protocol currently envisages, within square-bracketed text, the declaration of facilities at which "Work with Listed Agents and/or Toxins" has been carried out. It is possible that such information may emerge as something required to be provided within information to be provided under other requirements for declarations. There is no suggestion that the agents and toxins on the list should be categorized and subject to different declaration, routine inspection and transfer regimes depending on the category.

36. A change to the list of agents and toxins within the BTWC Protocol would be necessary when it was judged that the regime based on declarations and declaration follow-up procedures of those facilities of most relevance to the Convention was becoming less effective because of the omission of facilities within which work was being carried out on other agents or toxins. Such changes are not envisaged as being frequent as the current list is **not** intended to be comprehensive or all-inclusive. Rather the Protocol list of agents and toxins is intended to ensure that obligations for declarations and declaration follow-up procedures are uniform on all States Parties.

37. It is not therefore apparent why 5 bis proposes an intermediate procedure requiring a vote by the Conference of States Parties rather than the procedure elaborated in paragraph 5 in which a change recommended by the Executive Council shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation by the Executive Council – the same procedure as for **all** changes to the CWC Annex on Chemicals.

38. Furthermore, it is noted that 5 *bis* has **no** provision for the Director-General to evaluate the proposal *to determine all its possible consequences for the provisions and implementation of the Protocol and for the provisions and the implementation of the BTWC and to communicate any such information to all States Parties and the Executive Council or the Conference of States Parties.* The proposal made in the latest ~~striketrough~~ version¹⁸ to delete 5 *bis* on the grounds elaborated by the FOC, namely:

FOC recommends deletion of this paragraph on the basis that any changes to the lists of agents and toxins contained in Annex A can be considered in the manner specified in this paragraph according to paragraph 4 above, i.e. initially by the Executive Council, unless one State Party objects, in which case any change will be considered as a matter of substance in accordance with paragraph 5(e) above.

is logical and is supported.

39. Our view is that there would be sound logic in adopting a parallel approach to that in the CWC regarding its Annex on Chemicals for the Protocol Article XIV in respect of **all** changes to I. *Lists and Criteria (Agents and Toxins)* in Annex A. We would recommend addition of a new second sentence in paragraph 4 of Article XIV to read “*All changes to Section I Lists and Criteria (Agents and Toxins) of Annex A shall be made in accordance with paragraph 5.*”

Strikethrough Text for Article XIV

40. It is recommended that Article XIV should read as follows:

ARTICLE XIV

AMENDMENTS

~~1.~~ *Any time after the entry into force of this Protocol any State Party may propose amendments to this Protocol or its Annexes or Appendices. Any State Party may also propose changes, in accordance with paragraph 4, to ~~the Annexes and Appendices of this Protocol.~~ **specified parts of this Protocol or its Annexes or Appendices.** Proposals for amendment shall be subject to the procedures in paragraphs 2 and 3. Proposals for changes, as specified in paragraph 4, shall be subject to the provisions set out in paragraph 5.*

2. *Any proposal for an amendment shall be communicated to the Director-General. The proposed amendment shall be considered only by an Amendment Conference. The Director-General shall circulate the proposal to all States Parties and seek their views on whether an Amendment Conference should be convened to consider the proposal. If one-third or more of the States Parties notify the Director-General, not later than 30 days after the circulation of the proposal, that they support the convening of an Amendment Conference, the Director-General shall convene such a Conference to which all States Parties shall be invited. The Amendment Conference shall be held immediately following a regular session of a Conference of States*

¹⁸United 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/49/Add. 3, 15 December 1999, Geneva.

Parties unless all States Parties which support the convening of an Amendment Conference request that it be held earlier. In no case shall an Amendment Conference be held sooner than 60 days after the circulation of the proposed amendment. Amendments shall be adopted by the Amendment Conference by a positive vote of a majority of all States Parties with no State Party casting a negative vote.

~~3.~~ *Amendments shall enter into force for all States Parties 30 days after the deposit of the instruments of ratification or acceptance by all of the States Parties casting a positive vote at the Amendment Conference.*

4. *In order to assure the viability and effectiveness of this Protocol, provisions in sections ... of the Annexes and Appendices **the Appendices, sections ... of the Annexes and those sections of Article III (D) which are identified in that Article as being subject to this paragraph**, shall be subject to changes in accordance with paragraph 5, if **the** proposed changes are related only to matters of a technical or administrative nature. All changes to Section I Lists and Criteria (Agents and Toxins) of Annex A shall be made in accordance with paragraph 5. Annex C [Measures to strengthen the implementation of Article III], Annex D Investigations and Section I General principles for the handling of confidential information of Annex E Confidentiality Provisions Sections ... of the Annexes or Appendices shall not be subject to changes in accordance with paragraph 5.*

5. *Proposed changes referred to in paragraph 4 shall be made in accordance with the following procedures:*

(a) *The text of the proposed changes, together with supporting documentation, shall be transmitted to the Director-General. The Director-General shall promptly communicate any such proposal to all States Parties, ~~and~~ the Executive Council **and the Depository(ies)**. Any State Party and the Director-General may provide additional information to assist in the evaluation of the proposal;*

(b) *Not later than 60 days after its receipt, the Director-General shall evaluate the proposal to determine all its possible consequences for the provisions and implementation of this Protocol and for the provisions and implementation of the ~~Biological and Toxin Weapons~~ Convention of 1972 and shall communicate any such information to all States Parties and the Executive Council;*

(c) *The Executive Council shall examine the proposal, **including whether the proposal fulfils the requirements of paragraph 4**, in the light of all the information available to it, ~~including whether the proposal fulfils the requirements of paragraph 4~~ **and any specific guidelines or criteria for review specified in the Article, Annex or Appendix to which the change is proposed**. Not later than 90 days after its receipt, the Executive Council shall notify its recommendations, with appropriate explanations, to all States Parties for consideration. States Parties shall acknowledge receipt within 10 days;*

(d) *If the Executive Council recommends to all States Parties that the proposal be adopted, it shall be considered approved if no State Party objects to it within 90 days after receipt of the recommendation. If the Executive Council*

recommends that the proposal be rejected, it shall be considered rejected if no State Party objects to the rejection within 90 days after receipt of the recommendation;

(e) If a recommendation of the Executive Council does not meet with the acceptance required under subparagraph (d), a decision on the proposal, including whether the proposal fulfils the requirements of paragraph 4, shall be taken as a matter of substance by a Conference of States Parties at its next session;

*(f) The Director-General shall notify all States Parties **and the Depositary(ies)** of any decision under this paragraph;*

(g) Changes approved under this procedure shall enter into force for all States Parties 180 days after the day of notification by the Director-General of their approval unless another time period is recommended by the Executive Council or decided by a Conference of States Parties.}]

~~*[5 bis Amendments to the list of agents and toxins contained in Annex A shall be considered by the Conference of States Parties in accordance with the following procedures:*~~

~~*— (a) — The criteria for inclusion or exclusion of an agent or toxin to the list of agents and toxins shall be agreed by the first Conference of States Parties;]*~~

~~*— (b) — Proposed additions or deletions to the list together with supporting documentation and evaluation against the criteria, shall be transmitted to the Director General. The Director General shall promptly communicate the proposal to all States Parties;*~~

~~*— (c) — The proposal shall be considered by the first following Conference of States Parties. Additions and deletions shall be adopted by the Conference by a positive vote of a majority of all States Parties present and voting, with no State Party casting a negative vote.}]*~~