

ARTICLE XII: SETTLEMENT OF DISPUTES

by 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."* This Evaluation Paper continues this series by considering Article XII *Settlement of Disputes* on which the AHG has made progress with the current rolling text containing five sets of square brackets.

Article XII

3. In October 1999, the text² for Article XII was unchanged from its earlier version and was as follows:

ARTICLE XII

SETTLEMENT OF DISPUTES

[1. Disputes that may arise concerning the application, interpretation or implementation of the Convention and this Protocol shall be settled in accordance with the relevant provisions of the Convention and this Protocol and in conformity with the Charter of the United Nations and other rules of international law.

2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the application, interpretation or implementation of this Protocol, the parties concerned shall engage in consultations without delay with a view to the expeditious settlement of the dispute by negotiation or by other mutually agreed peaceful means of the parties' choice, including recourse to appropriate organs of this Protocol or other organs established and entrusted by the Executive Council or the Conference of States Parties with tasks related 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/46 (Part I), 30 July 1999, Geneva.

settlement of these disputes in conformity with Articles IV and IX, and referral to the International Court of Justice in conformity with the Statute of the Court. The parties to a dispute [shall] [may] inform the Executive Council of the commencement of consultations, and shall keep the Executive Council informed of the actions being taken [and their outcomes]. The Executive Council may contribute to the settlement of a dispute by negotiation by whatever means it deems appropriate, including offering its good offices.

3. The Conference of States Parties shall consider questions related to disputes raised by States Parties, the Organization or brought to its attention by the Executive Council.

4. The Conference of States Parties and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article IX.

[5. This Article is without prejudice to Articles III and V of this Protocol.]

6. Nothing in this Article shall affect the right of two or more States Parties to clarify and resolve any dispute among themselves.]

4. The ~~strike through~~ version of Article XI provided³ by the FOC on Legal Issues for further consideration proposes:

ARTICLE XII

SETTLEMENT OF DISPUTES

~~1.~~ *Disputes that may arise concerning the application, interpretation or implementation of the Convention and this Protocol shall be settled in accordance with the relevant provisions of the Convention and this Protocol and in conformity with the Charter of the United Nations and other rules of international law.*

2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the application, interpretation or implementation of this Protocol, the parties concerned shall engage in consultations without delay with a view to the expeditious settlement of the dispute by negotiation or by other mutually agreed peaceful means of the parties' choice, including recourse to appropriate organs of this Protocol or other organs established and entrusted by the Executive Council or the Conference of States Parties with tasks related to the settlement of these disputes in conformity with Articles IV and IX, and referral to the

³United 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.

International Court of Justice in conformity with the Statute of the Court. The parties to a dispute ~~shall~~ ~~may~~ inform the Executive Council of the commencement of consultations, and shall keep the Executive Council informed of the actions being taken [and their outcomes]. The Executive Council may contribute to the settlement of a dispute by negotiation by whatever means it deems appropriate, including offering its good offices.

3. The Conference of States Parties shall consider questions related to disputes raised by States Parties, the Organization or brought to its attention by the Executive Council.

4. The Conference of States Parties and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article IX.

~~5. This Article is without prejudice to Articles III and V of this Protocol.~~

6. Nothing in this Article shall affect the right of two or more States Parties to clarify and resolve any dispute among themselves.

Evaluation

5. The BTWC itself contains no specific Article on settlement of disputes. The nearest approximation is Article V, which has been understood to recommend both bilateral and multilateral procedures for "*solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention.*" Procedures have been elaborated by successive Review Conferences, and a Consultative Meeting was held in 1997 in accordance with such procedures at the request of a State Party. It is not, however, argued that Article V of the BTWC corresponds to a dispute settlement Article as such.

6. Article VI of the BTWC, which provides for complaints to be lodged with the Security Council and for the Council to initiate investigations, is also relevant to the handling of disputes over allegations of non-compliance, but is not a dispute settlement Article as such.

7. A dispute settlement Article was included in the Chemical Weapons Convention (CWC)⁴ as Article XIV:

ARTICLE XIV

SETTLEMENT OF DISPUTES

1. Disputes that may arise concerning the application or the interpretation of this Convention shall be settled in accordance with the relevant provisions of this

⁴Organization 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>

Convention and in conformity with the provisions of the Charter of the United Nations.

2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the interpretation or application of this Convention, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Convention and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of the Court. The States Parties involved shall keep the Executive Council informed of actions being taken.

3. The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to start the settlement process of their choice and recommending a time-limit for any agreed procedure.

4. The Conference shall consider questions related to disputes raised by States Parties or brought to its attention by the Executive Council. The Conference shall, as it finds necessary, establish or entrust organs with tasks related to the settlement of these disputes in conformity with Article VIII, paragraph 21 (f).

5. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article VIII, paragraph 34 (a).

6. This Article is without prejudice to Article IX or to the provisions on measures to redress a situation and to ensure compliance, including sanctions.

and in the Comprehensive Test Ban Treaty (CTBT)⁵ as Article VI:

ARTICLE VI

SETTLEMENT OF DISPUTES

1. Disputes that may arise concerning the application or the interpretation of this Treaty shall be settled in accordance with the relevant provisions of this Treaty and in conformity with the provisions of the Charter of the United Nations.

2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the application or interpretation of this Treaty, the parties concerned shall consult together with a view to the expeditious settlement of the dispute by negotiation or by other peaceful means of the parties' choice, including recourse to appropriate organs of this Treaty and, by mutual consent, referral to the International Court of Justice in conformity with the Statute of

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

the Court. The parties involved shall keep the Executive Council informed of actions being taken.

3. The Executive Council may contribute to the settlement of a dispute that may arise concerning the application or interpretation of this Treaty by whatever means it deems appropriate, including offering its good offices, calling upon the States Parties to a dispute to seek a settlement through a process of their own choice, bringing the matter to the attention of the Conference and recommending a time-limit for any agreed procedure.

4. The Conference shall consider questions related to disputes raised by States Parties or brought to its attention by the Executive Council. The Conference shall, as it finds necessary, establish or entrust organs with tasks related to the settlement of these disputes in conformity with Article II, paragraph 26 (j).

5. The Conference and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article II, paragraph 38 (h).

6. This Article is without prejudice to Articles IV and V.

These provisions, in the CWC, the CTBT and the draft Protocol embrace in their scope both disputes between two or more States Parties and disputes between one or more States Parties and the Organization.

8. The purpose of this Article is to emphasise the importance of settling by peaceful means any disputes that may arise and to provide States Parties with a range of procedures from among which to choose their preferred method of settlement. It also confers appropriate powers on specified treaty institutions, namely the Conference and Executive Council of the relevant Organization.

9. A well-drafted dispute settlement Article provides an element of stability in any treaty regime. It does this by specifying the range of procedures which any disputants will be expected to follow, and by giving formal recognition to the wider international interest which entitles those treaty institutions to take the initiative in offering some form of intermediary intervention or encouraging direct negotiation.

10. The proposed text for Article XII of the Protocol follows the CWC and CTBT examples quite closely in structure and content. It is largely uncontroversial. Nevertheless a few square brackets remain.

Article XII Paragraph 1

11. This introductory paragraph sets out the basic obligation to settle disputes in accordance with the relevant provisions of the Convention and the Protocol and in conformity with the UN Charter. It is to be noted that it covers disputes concerning the application, interpretation or implementation of the Convention itself, and not just of the Protocol. In this way it seeks to remedy the lack of a dispute settlement Article, as such, in the Convention itself, without

detracting in any way from the provisions for cooperation and consultation in Article V and for complaint and investigation in Article VI.

12. *Implementation* is not found in the equivalent provision in paragraph 1 of Article XIV of the CWC or that in paragraph 1 of Article VI of the CTBT. Strictly, the word is redundant because implementation is already included in *application*. Nevertheless, *implementation* is in the Protocol text, probably because of the experience gained in the implementation of the CWC.

13. The other difference from the CWC and CTBT antecedents is the addition of the words "*and other rules of international law*" at the end of the paragraph. This addition is unexceptionable: self-evidently the UN Charter does not encompass all rules of international law. The extended formulation "*in conformity with the Charter of the United Nations and other rules of international law*" is only problematic if there is a risk of "*other rules*" being invoked against the Charter.

Article XII Paragraph 2

14. The first two sentences correspond to paragraph 2 of Article XIV of the CWC and paragraph 2 of Article VI of the CTBT, which are, however, expanded here.

15. The uncontroversial differences are slight. Apart from the addition of the word *implementation*, there is the addition of *without delay* to the obligation to engage in consultations: the addition of subsidiary "*organs established and entrusted by the Executive Council or the Conference of States Parties with tasks related to the settlement of these disputes in conformity with Articles IV and IX*", which picks up paragraph 4 of Article XIV of the CWC; and the relocation of *mutually agreed* so that it covers all third-party means of peaceful settlement, not just referral to the International Court of Justice. This last change simply reinforces the words *of the parties' choice* and emphasises the principle of consent in international dispute settlement.

16. Alternative language is in square brackets in the second sentence. Its middle section simply repeats the corresponding obligations in the CWC and CTBT to "*keep the Executive Council informed of actions being taken.*" The language under debate relates to two extensions:

a. an obligation to inform the Executive Council of commencement of consultations,

and

b. an obligation to inform the Executive Council of the outcomes of actions being taken.

These extensions strengthen the presumption of an international interest in the peaceful settlement of any dispute, even if the States Parties concerned have chosen the route of direct negotiation and have not engaged in any of the third-party procedures available. In the first square-bracketed alternatives *shall* is therefore preferable to *may* and the square brackets around *and their outcomes* should be removed.

17. The third sentence corresponds to paragraph 3 of Article XIV of the CWC and paragraph 3 of Article VI of the CTBT but is greatly truncated. It no longer includes the possibility of

recommending a time-limit for any agreed procedure, a provision based on bitter experience of procrastination in earlier disputes unrelated to chemical weapons which was deliberately added during the negotiation of the CWC and carried forward into the CTBT. Furthermore, the power of the Executive Council to call upon the States Parties to seek a settlement through a process of their own choice, as in the CTBT, or to start the settlement process, as in the CWC, is no longer explicit. Neither is the power of the Executive Council to refer the matter to the Conference, although the reciprocal wording of paragraph 3 implies that this power is to be understood in paragraph 2.

18. Paragraph 34 of *Article IX The Organization* of the Protocol is also relevant. This states that:

34. The Executive Council shall consider concerns raised by a State Party regarding compliance and cases of possible non-compliance and abuse of the rights established by this Protocol. In doing so, the Executive Council shall consult with the States Parties involved and, as appropriate, request a State Party to take measures to redress the situation within a specified time. To the extent that the Executive Council considers further action to be necessary, it shall take, inter alia, one or more of the following measures:

(a) Notify all States Parties of the issue or matter;

(b) Bring the issue or matter to the attention of Conference;

[(c) Make recommendations to the Conference regarding measures to redress the situation and ensure compliance in accordance with Article V.]

19. The addition of the words *by negotiation* to what the third sentence of Article XII paragraph 2 is important for those States which favour the bilateral settlement of disputes. It opens up the possibility of the Executive Council deliberately returning a dispute to the bilateral mode for settlement. It will be all the more important to retain this possibility if *shall* prevails over *may* in the second sentence and thereby introduces an obligation to inform the Executive Council of the commencement of negotiations. The existence of a legitimate international interest in the peaceful settlement of any dispute is sufficiently recognised in this Article without States being steered into third-party means of settlement when bilateral negotiation is, in a particular case, the preferred procedure. There is accordingly a good case for the specific mention of *negotiation* that occurs here.

20. Some rewording is still necessary to give effect to the intention of this sentence. With the time-limit provision restored at the end, this might read:

The Executive Council may contribute to the settlement of a dispute by whatever means it deems appropriate, including offering its good offices and calling upon the States parties to a dispute to seek a settlement by negotiation or by other peaceful means of the parties' choice. It may recommend a time-limit for any agreed procedure.

Article XII Paragraph 3

21. This paragraph corresponds to paragraph 4 of Article XIV of the CWC and to paragraph 4 of Article VI of the CTBT, but without the reference to subsidiary organs, already covered in paragraph 2.

Article XII Paragraph 4

22. This paragraph corresponds to paragraph 5 of Article XIV of the CWC and to paragraph 5 of Article VI of the CTBT. The advisory jurisdiction of the International Court of Justice is open, as of right, only to the General Assembly and Security Council of the United Nations (Article 96.1 of the Charter⁶) but under Article 96.2 the General Assembly can authorise "*other organs of the United Nations and specialized agencies [to] request advisory opinions of the Court on legal questions arising within the scope of their activities.*" Under Article 65.1 of its Statute⁷, the Court "*may give an advisory opinion on any legal question at the request of whatever body may be authorised by or in accordance with the Charter of the United Nations to make such a request.*"

23. The separate empowerment of the two principal organs of the new Organization to request advisory opinions, if authorised by the UN General Assembly, corresponds to the provisions for the Conference and Executive Council of the OPCW and the CTBTO under the CWC and the CTBT respectively.

Article XII Paragraph 5

24. This paragraph corresponds to paragraph 6 of Article XIV of the CWC and to paragraph 6 of Article VI of the CTBT. The square brackets will presumably be removed once Articles III and V are finalised.

Article XII Paragraph 6

25. This paragraph has no corresponding provision in the CWC or the CTBT but is unexceptionable. It provides some reassurance for the States already referred to, in the evaluation of paragraph 2, which favour bilateral negotiation as their preferred method of dispute settlement, that they will not be forced into third-party procedures without their consent. It is consistent with other provisions recommended for this Article, including the rewording of paragraph 2.

Strikethrough Text for Article XII

26. It is recommended that Article XII should read as follows:

ARTICLE XII

SETTLEMENT OF DISPUTES

¶ 1. Disputes that may arise concerning the application, interpretation or implementation of the Convention and this Protocol shall be settled in accordance

⁶United Nations, *Charter of the United Nations*, 26 June 1945. Available at <http://www.un.org/aboutun/charter>

⁷International Court of Justice, *Statute*. Available at <http://www.icj-cij.org/icjwww/basicdocuments/Basetext/istatute.htm>

with the relevant provisions of the Convention and this Protocol and in conformity with the Charter of the United Nations and other rules of international law.

*2. When a dispute arises between two or more States Parties, or between one or more States Parties and the Organization, relating to the application, interpretation or implementation of this Protocol, the parties concerned shall engage in consultations without delay with a view to the expeditious settlement of the dispute by negotiation or by other mutually agreed peaceful means of the parties' choice, including recourse to appropriate organs of this Protocol or other organs established and entrusted by the Executive Council or the Conference of States Parties with tasks related to the settlement of these disputes in conformity with Articles IV and IX, and referral to the International Court of Justice in conformity with the Statute of the Court. The parties to a dispute ~~shall~~ ~~may~~ inform the Executive Council of the commencement of consultations, and shall keep the Executive Council informed of the actions being taken ~~and their outcomes~~. The Executive Council may contribute to the settlement of a dispute ~~by negotiation~~ by whatever means it deems appropriate, including offering its good offices **and calling upon the States parties to a dispute to seek a settlement by negotiation or by other peaceful means of the parties' choice. It may recommend a time-limit for any agreed procedure.***

3. The Conference of States Parties shall consider questions related to disputes raised by States Parties, the Organization or brought to its attention by the Executive Council.

4. The Conference of States Parties and the Executive Council are separately empowered, subject to authorization from the General Assembly of the United Nations, to request the International Court of Justice to give an advisory opinion on any legal question arising within the scope of the activities of the Organization. An agreement between the Organization and the United Nations shall be concluded for this purpose in accordance with Article IX.

~~5. This Article is without prejudice to Articles III and V of this Protocol.~~

6. Nothing in this Article shall affect the right of two or more States Parties to clarify and resolve any dispute among themselves.