

## ARTICLE XV DURATION AND WITHDRAWAL

by Nicholas A Sims<sup>†</sup>

### 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 XV *Duration and Withdrawal* on which the AHG has made good progress with the current rolling text containing only three pairs of square brackets.

### Article XV

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

#### ARTICLE XV

##### DURATION AND WITHDRAWAL

*1. This Protocol shall remain in force so long as the Biological and Toxin Weapons Convention of 1972 is in force.*

*2. Each State Party to this Protocol shall, in exercising its national sovereignty, the right to withdraw from this Protocol if it decides that extraordinary events, related to the subject matter of this Protocol, have jeopardized its supreme interests. It shall give notice of such withdrawal to [the Depositary/ies] all other States Parties to the Protocol, the Executive Council and the United Nations Security Council [6] months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.*

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

<sup>2</sup>United Nations, *Procedural Report of the Ad Hoc Group of the States Parties to the Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on their Destruction*, BWC/AD HOC GROUP/46 (Part I), 30 July 1999, Geneva.

3. *The withdrawal of a State Party from this Protocol shall not in any way affect its obligations under other international legal instruments to which it is a party, [particularly the Biological and Toxin Weapons Convention of 1972, the Geneva Protocol of 1925 and the Chemical Weapons Convention of 1993].*

4. *Any State Party that withdraws from the Biological and Toxin Weapons Convention of 1972 shall be deemed to have withdrawn from this Protocol, irrespective of whether it has complied with the procedure set forth in paragraph 2 of this Article. The Protocol shall cease to be in force for such a State on the same day as the Biological and Toxin Weapons Convention of 1972 ceases to be in force for it.*

4. The ~~striketrough~~ version of Article XV provided<sup>3</sup> by the FOC on Legal Issues for further consideration has a number of proposed amendments as follows:

#### ARTICLE XV

##### DURATION AND WITHDRAWAL

1. *This Protocol shall remain in force so long as the ~~Biological and Toxin Weapons Convention of 1972~~ **Convention** is in force.*

2. *Each State Party to this Protocol shall, in exercising its national sovereignty, **have** the right to withdraw from this Protocol if it decides that extraordinary events, related to the subject matter of this Protocol, have jeopardized its supreme **national** interests. It shall give notice of such withdrawal to [the Depositary/ies] all other States Parties to the Protocol, the Executive Council and the United Nations Security Council ~~[- 6 -]~~ months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme **national** interests.*

3. *The withdrawal of a State Party from this Protocol shall not in any way affect its obligations under other international legal instruments to which it is a party. ~~[particularly the Biological and Toxin Weapons Convention of 1972, the Geneva Protocol of 1925 and the Chemical Weapons Convention of 1993].~~*

4. *Any State Party that withdraws from the ~~Biological and Toxin Weapons Convention of 1972~~ **Convention** shall be deemed to have withdrawn from this Protocol, irrespective of whether it has complied with the procedure set forth in paragraph 2 of this Article. The Protocol shall cease to be in force for such a State on the same day as the ~~Biological and Toxin Weapons Convention of 1972~~ **Convention** ceases to be in force for it.*

## Evaluation

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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.

5. It is useful in evaluating the Protocol Article XV language to consider this against a background of the language on duration and withdrawal in the BTWC as well as that in more recent conventions and treaties such as that in the Chemical Weapons Convention (CWC) and in the Comprehensive Nuclear-Test-Ban Treaty (CTBT).

6. Article XIII of the BTWC<sup>4</sup> which opened for signature in 1972 addresses duration and withdrawal:

#### ARTICLE XIII

1. *This Convention shall be of unlimited duration.*

2. *Each State Party to this Convention shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject-matter of the Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other States Parties to the Convention and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.*

7. The CWC language<sup>5</sup> in Article XVI is as follows:

#### ARTICLE XVI DURATION AND WITHDRAWAL

1. *This Convention shall be of unlimited duration.*

2. *Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Convention if it decides that extraordinary events, related to the subject matter of this Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal 90 days in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.*

3. *The withdrawal of a State Party from this Convention shall not in any way affect the duty of States to continue fulfilling the obligations assumed under any relevant rules of international law, particularly the Geneva Protocol of 1925.*

whilst the CTBT language<sup>6</sup> in Article IX is closely similar:

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<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>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>6</sup>*Comprehensive Nuclear-Test-Ban Treaty*. Available at <http://www.ctbto.org/ctbto/pdf/cbten.pdf>

## ARTICLE IX

### DURATION AND WITHDRAWAL

1. *This Treaty shall be of unlimited duration.*
2. *Each State Party shall, in exercising its national sovereignty, have the right to withdraw from this Treaty if it decides that extraordinary events, related to the subject matter of this Treaty, have jeopardized its supreme interests.*
3. *Withdrawal shall be effected by giving notice six months in advance to all other States Parties, the Executive Council, the Depositary and the United Nations Security Council. Notice of withdrawal shall include a statement of the extraordinary event or events which a State Party regards as jeopardizing its supreme interests.*

8. **The first paragraph** of the Protocol Article XV renders the duration of the Protocol coterminous with that of the Convention, which itself has *unlimited* duration (Article XIII.1 of the BTWC).

9. **The second paragraph** is the withdrawal clause. Leaving aside for a moment the question of the length of notice, which is currently within square brackets, this clause has similar language to that of Article XIII.2 of the BTWC, of Article XVI.2 of the CWC and Article IX.2 & 3 of the CTBT. It recognizes the right of withdrawal as belonging to each State Party in the exercise of its national sovereignty, but proceeds to set three conditions. It does this by limiting the permissible occasions for withdrawal to *extraordinary events, related to the subject matter of this Protocol* which have jeopardized its supreme **national** interests of its country. [The bold shows the proposed FOC/22 change<sup>7</sup> in the ~~striketrough~~ text] This is understood as an attempt to preclude the potentially destructive effect on a treaty of the international legal doctrine of Fundamental Change of Circumstances, if left unconstrained, by introducing three tests: of extra-ordinariness, treaty relevance and magnitude (*jeopardized its supreme national interests*). These three tests in combination narrow the range of events which can properly be invoked by a State Party as justifying withdrawal.

10. The length of notice to be given is proposed, within square brackets, as **6 months**. This is the same notice as in Article IX.3 of the CTBT. It is double the **90 days** specified in Article XVI.2 of the CWC and the **3 months** laid down in Article XIII.2 of the BTWC. That 3 months provision was identical to and followed the precedents of the 1968 Nuclear Non-Proliferation Treaty (Article X. 1) and the 1971 Sea Bed Treaty (Article VIII). Walter Krutzsch and Ralf Trapp have written<sup>8</sup> of the 90 days requirement in the CWC that:

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<sup>7</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>8</sup>Walter Krutzsch & Ralf Trapp, *A Commentary on the Chemical Weapons Convention*, Dordrecht, Martinus Nijhoff, 1994, p.248.

*The time span should enable States Parties either to try to convince the State Party in question not to insist on its decision (for instance by providing additional assistance against use or threat of use of chemical weapons) or to prepare individually or collectively for measures adequate to cope with an adverse situation resulting from such a withdrawal.*

11. In the case of the CWC, and of the BTWC, the withdrawal clause has not been put to the test, but in one other treaty it has been. The Democratic People's Republic of Korea invoked Article X.1 of the NPT in March 1994 and suspended, but did not cancel, the implementation of its withdrawal one day before the three months' notice would have expired. At the 1995 Review and Extension Conference, and subsequently, it was regarded by the States Parties to the NPT as having a unique status of indeterminacy somewhere between a Party and a Non-Party to that treaty. From this one case, it is difficult to draw definite conclusions about length of notice: about whether, for instance, the States Parties to the NPT would have been able to organise a more effective collective response in 1994 if the DPRK had been required to give 6 months' notice rather than 3, or whether the balance of incentives for the DPRK to suspend, or proceed to, implementation of withdrawal would have been different. Other things being equal, however, a 6 months' notice requirement renders the Protocol marginally stronger and is therefore to be recommended.

12. The other element in Article XV.2 of the Protocol in square brackets relates to whether the notice of such withdrawal should be given to [*the Depositary/ies*] as well as to *all other States Parties to the Protocol, the Executive Council and the United Nations Security Council*. It is interesting to note that there is no such requirement to notify the Depositaries in Article XIII.2 of the BTWC or in Article X.1 of the NPT (which also had the UK, the Soviet Union and the US as its three Depositaries). Whilst both the CWC and the CTBT have the requirement to notify the Depositary, it can be argued that such notification is only necessary if the Depositary is the Secretary-General of the United Nations, as is the case with the CWC and the CTBT, but is not necessary if the Depositaries are other States Parties. In Evaluation Paper No. X on Article XXII *Depositary/ies*<sup>9</sup> we have argued that the Depositary of the Protocol should be the Secretary-General of the United Nations; consequently, the Protocol text should read *the Depositary*.

13. **The third paragraph**, once the unnecessary square brackets are removed, protects international obligations under the three most closely related treaties, including the BTWC itself, in the event of withdrawal from the Protocol by a State which remains a Party to the BTWC. However, in the ~~strike through~~ text<sup>10</sup> prepared by the FOC for further consideration, it is proposed to limit this paragraph to stating that *The withdrawal of a State Party from this Protocol shall not in any way affect its obligations under other international legal instruments to which it is a party'* without naming the three most closely related treaties. It may be thought that their naming in Article XI *Relationship of the Protocol to the BTWC and Other International Agreements* renders their naming here unnecessary. However, the two Articles address **distinctly different situations**. Article XI is concerned with those States for which the Protocol is in force, Article XV is concerned with those States for which the

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

<sup>10</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.

Protocol has ceased to be in force. Protection of international legal obligations under the 1925 Geneva Protocol and the 1993 Chemical Weapons Convention is at least as important to emphasise in the latter situation as in the former. So too is the continuing validity of state's obligations under the BTWC itself. Accordingly we recommend that the three treaties remain in the text of Article XV. A slight rearrangement of the wording would bring the reference to the BTWC into conformity with the streamlined reference to the Convention proposed elsewhere in the ~~striketrough~~ text and ensure consistency within the ~~striketrough~~ text proposed for Article XV, thus:

3. *The withdrawal of a State Party from this Protocol shall not in any way affect its obligations under **the Convention** or other international legal instruments to which it is a party, particularly ~~the Biological and Toxin Weapons Convention of 1972, the Geneva Protocol of 1925 and the Chemical Weapons Convention of 1993.~~*

14. **The fourth paragraph** provides for automatic withdrawal from the Protocol if a State withdraws from the BTWC. This is a logical corollary to the conditions for signature in Article XVII and for accession in Article XIX, which limit participation in the Protocol to States Parties to the BTWC.

15. The other proposals made in the ~~striketrough~~ text proposed by the FOC to streamline the reference to the Convention and to insert **national** in two places in paragraph 2 of the Article are endorsed.

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

16. Our view is that Article XV should have the remaining square brackets removed and additional text added as shown in a strike-through text version of Article XV below so as to produce clean text:

#### *ARTICLE XV*

##### *DURATION AND WITHDRAWAL*

1. *This Protocol shall remain in force so long as the ~~Biological and Toxin Weapons Convention of 1972~~ **Convention** is in force.*

2. *Each State Party to this Protocol shall, in exercising its national sovereignty, **have** the right to withdraw from this Protocol if it decides that extraordinary events, related to the subject matter of this Protocol, have jeopardized its supreme **national** interests. It shall give notice of such withdrawal to ~~the Depository~~ ~~and~~, all other States Parties to the Protocol, the Executive Council and the United Nations Security Council ~~6~~ ~~months~~ in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme **national** interests.*

3. *The withdrawal of a State Party from this Protocol shall not in any way affect its obligations under **the Convention** or other international legal instruments to which it is a party, particularly ~~the Biological and Toxin Weapons Convention of 1972, the Geneva Protocol of 1925 and the Chemical Weapons Convention of 1993.~~*

4. *Any State Party that withdraws from the ~~Biological and Toxin Weapons Convention of 1972~~ **Convention** shall be deemed to have withdrawn from this Protocol,*

*irrespective of whether it has complied with the procedure set forth in paragraph 2 of this Article. The Protocol shall cease to be in force for such a State on the same day as the ~~Biological and Toxin Weapons Convention of 1972~~ **Convention** ceases to be in force for it.*