SPECIFICITY OF MODEL FACILITY AGREEMENTS UNDER THE CHEMICAL WEAPONS CONVENTION

presented to

Combined Meeting of the Expert Group on Chemical Issues and Chemical Industry Representatives

The Hague, Kingdom of the Netherlands

27 June 1995

presented by

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The Chemical Weapons Convention\(^1\) (CWC) contains the most extensive verification inspection provision of any arms control agreement in history. Among its innovations are provisions for "facility agreements" to govern on-site verification inspections of certain facilities.\(^2\) A facility agreement is "an agreement or arrangement between a State Party and the Organization [for the Prohibition of Chemical Weapons] relating to a specific facility subject to on-site verification pursuant to Articles IV, V and VI."\(^3\) The purpose of this very brief paper is to discuss the value of specificity in the "model" facility agreements that are to serve as the basis for facility agreements.\(^4\) The views expressed herein are those of the author alone, and not necessarily those of the government of the United States of America or any other institution.

The model facility agreements are a key document to national implementation of the CWC. As explained in the Manual for National Implementation of the Chemical Weapons Convention, facility agreements are among the important protections the CWC provides for confidential business information at facilities subject to CWC inspections.\(^5\) Thus, the structure of the models for these agreements will fundamentally determine how national implementation of the Convention will affect various private firms.\(^6\) A particularly salient question that must be addressed in drafting model facility agreements under the CWC is how specific they should be.

Specificity in CWC model facility agreements can be thought of as having several components. First, the extent to which the model delineates the structure of CWC facility agreements can vary. Second, the textual content that must be included in facility agreements

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can be prescribed in the models. Third, the models can determine the range of cross references to other official CWC policies that must be made in the facility agreements.

Relatively unspecific model facility agreements have certain advantages. As the amount of detail contained in the models increases — especially the extent of textual content that is specified — the amount of discretion to vary the facility agreements to take account of facility- or State Party-specific conditions may decrease. Flexibility in national implementation can be enhanced where the model facility agreements permit more room for variability.

At the same time, more detailed model facility agreements can promote key goals of the Convention. Any treaty is essentially a contract between the parties to the treaty. One of the major risks to the success of any contract is that it could be written so vaguely that the parties could have different understandings of its meaning, possibly resulting in disputes, and, in extreme cases, prevention of its enforcement. Contracts that are more detailed carry a lower risk of misunderstanding because less room for differing interpretations exists. Where the models are more specific, the facility agreements they spawn will resemble each other more because less opportunity for variability will exist. As a corollary, the inspectors that must comply with their terms are less likely to make mistakes and the extent of access to facilities in different States Parties is likely to be more uniform than if the models permit great differences.

An interesting comparison can be made between the 27 February 1995 draft CWC Model for Facility Agreements for Schedule 2 Plant Sites that has been circulated for review and the document known as INFCIRC/153, which prescribes the structure and content of safeguards agreements between parties to the Nuclear Non-Proliferation Treaty (NPT) and the International Atomic Energy Agency. These documents are analogous in some respects because both are intended as models for individual agreements between an international organization constituted to carry out a multilateral arms control agreements. However, it must be recognized that the scope of INFCIRC/153 Safeguards Agreements is broader than CWC facility agreements because the former govern many subjects beyond the verification inspections that are the focus of the latter.

In general, it appears that INFCIRC/153 is more detailed than the 27 February 1995 draft CWC model facility agreement. Although both documents are structurally complete, INFCIRC/153 appears to be intended to contain most of the exact text that is included in individual Safeguards Agreements because its wording contains few specific locations where changes or additions are invited. In contrast, the 27 February 1995 draft model facility agreement.

7. "A complete review of the contract cases in the last half-century shows that a high percentage of contract litigation is concerned with the interpretation of language. . . . Vagueness of expression, indefiniteness and uncertainty as to any of the essential terms of an agreement, have often been held to prevent the creation of an enforceable contract." 1 J. PERILLO, CORBIN ON CONTRACTS § 4.1 (1995) (footnote omitted).

8. The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons, IAEA doc. INFCIRC/153 (June 1972).
agreement explicitly recognizes that many site-specific details are to be added, such as health and safety requirements, procedures for protecting confidential information, and plant site details. The only respect in which INFCIRC/153 is noticeably less detailed than the 27 February draft CWC model facility agreement is that INFCIRC/153 apparently contains less extensive policy cross-references than the 27 February document. Perhaps this can be attributed to the fact that the NPT regime has a longer history, with a more extensive set of ancillary guidance and policy documents that need not be explicitly referenced.

Viewed in light of these considerations, the 27 February 1995 draft CWC Model for Facility Agreements for Schedule 2 Plant Sites appears to be in the range of appropriate specificity in view of its purpose. It contains a very definite structure that guarantees that the individual facility agreements will all address the same subjects, thus contributing to certainty, uniformity, and dispute avoidance. Its extensive cross-referencing of relevant policies, such as its three annexes reproducing various Organization policy statements, further ensure smooth facility agreement negotiation and operation. At the same time, its text is less detailed than INFCIRC/153, thereby leaving room for national variations where appropriate. While the question of how much detail is appropriate in the CWC model facility agreements is one with no single right answer, legal analysis can shed light on the advantages and disadvantages of different approaches.