LEGAL ASPECTS OF NATIONAL IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION CONFIDENTIALITY PROVISIONS

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Workshop II: Chemical Industry Issues

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OF THE CHEMICAL WEAPONS CONVENTION
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1 INTRODUCTION

Good day. It is an honor to address such a distinguished audience. I am grateful to the Government of Cote D'Ivoire for hosting this important gathering and to Mr. Ian Kenyon and the staff of the Provisional Technical Secretariat (PTS) of the Organisation for the Prohibition of Chemical Weapons (OPCW) for sponsoring it. This seminar is an excellent opportunity for all of us to learn from each other about how the Chemical Weapons Convention (CWC) can become a foundation of arms control in Africa and around the world. At this meeting I speak only for myself, neither for the government of the United States of America nor for any other institution.

Today, I shall discuss legal aspects of implementing the CWC's confidentiality provisions. These implementing measures are universal, applying not only to the few States Parties that will declare and destroy chemical weapons, but also to the many States Parties that have never had a chemical weapons programme.

This new need for national measures to implement multilateral arms control agreements has generated unease due to a perception that implementation may be burdensome and at odds with national law. In 1993, concerns arose that the complexity of integrating the treaty with national law would cause each nation to effectuate the Convention without regard to what other nations were doing, thereby engendering significant disparities in implementation steps among States Parties.

As a result, my colleagues and I prepared the Manual for National Implementation of the Chemical Weapons Convention late last year and presented it to each national delegation at the December 1993 meeting of the Preparatory Commission in The Hague. During its preparation, the Manual was reviewed by the Committee of Legal Experts on National Implementation of the Chemical Weapons Convention, a group of distinguished international jurists, law professors, legally-trained diplomats, government officials, and Parliamentarians from every region of the world, including Africa.

The Manual tries to increase understanding of the Convention by identifying its obligations and suggesting methods of meeting them. Education about CWC obligations and available alternatives to comply with these requirements can facilitate national responses that are consistent among States Parties. Thus, while the Manual avoids prescribing model statutory language, it offers options that can strengthen international realization of the Convention's goals.

if States Parties act compatibly in implementing them. Equally important, it is intended to build confidence that the legal issues raised by the Convention are finite and addressable.

At the September 1994 African seminar on CWC implementation, held in Pretoria, Republic of South Africa, I explained the eleven major categories of national implementing tasks that each State Party must address in order to comply with the CWC. It is not my purpose today to repeat that explanation, although I have brought a copy of our Manual for National Implementation of the Chemical Weapons Convention for each delegation.

Today, I want to discuss progress among several States in actually developing implementing measures for the Convention's confidentiality requirements. CWC legislation from Australia, Germany, Norway, South Africa, and Sweden were available at this writing in English through the PTS. Of course, it is important to note that this brief survey necessarily omitted examination of the existing "background" of other, related domestic laws that these signatories might also have adopted that affect CWC implementation.

The perspective from which I present my remarks is that of a lawyer. It is not my purpose to discuss the correctness of the policies embodied in the Convention, the politics of its negotiation, or to suggest to any States Parties how they should proceed. Neither will I comment on the quality or correctness of the national legislation I discuss here today. Instead, I hope that my brief review will give delegations a flavour of the choices that exist for national implementation of the CWC.

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6. Summary of proposed legislation in English as presented in PC-IV/A/WP.9 (28 September 1993), reprinted in Regional Seminar on National Authority and National Implementing Measures for the Chemical Weapons Convention: Summary of Proceedings, Warsaw, Poland (7-8 December 1993) (Provisional Technical Secretariat Occasional Papers — No. 3) (hereinafter Summary of Swedish CWC Implementing Legislation). Of course, since this document is a summary, it presumably lacks the level of detail included in the implementing legislation itself.
Article VII, paragraph 6 and Article IX, paragraph 11(c) of the Convention, as well as its Confidentiality Annex, contain important CWC provisions for protection of confidential business information (CBI), discussed in detail in chapter 7 of the Manual. Many States Parties will want to take steps to protect CBI from unwarranted disclosure during verification activities for reasons relating both to CWC requirements and to commercial realities. As discussed in chapter 7 of the Manual, CBI protection can include a variety of measures, including establishing CBI protection procedures, training CBI owners in protecting CBI under the Convention, regulating CBI handling by domestic government agencies, and penalizing wrongful disclosure. For example, a formal CBI marking system could be developed to enable CBI owners to inform domestic government agencies about the existence of CBI contained in information they report that should be "designated" as "confidential information" under the CWC’s Confidentiality Annex.

Three of the five national implementing measures that were reviewed explicitly address CBI protection. Both the Australian and the South African legislation prohibit employees of their respective national authorities from divulging any information — CBI or otherwise — to any other person except for certain Convention-related purposes. Violation is punishable by imprisonment in Australia, and by fine or imprisonment in South Africa.

The German implementing legislation takes a somewhat different approach to protecting CBI than the Australian and South African statutes. The German legislation authorises the government agencies that are empowered to gather or handle data in order to comply with the Convention — the Federal Export Office, the Foreign Office, and the Federal Ministry for Economy — to use this data only for the purposes for which the data was obtained or could have been obtained, and also requires these agencies to respect the CWC’s Confidentiality Annex. Similarly, the German legislation requires the In-Country Escort Group that it authorises to host CWC inspections to “take into account the protected interests of the responsible party as well as further persons affected . . . especially with regard to . . . confidential data in accordance


8. Australian CWC Implementing Legislation, supra note 2, § 102.


10. Australian CWC Implementing Legislation, supra note 2, § 102(1).

11. Compare South African CWC Implementing Legislation, supra note 5, § 26(1)(b) with id. § 26(ii).

12. See German CWC Implementing Legislation, supra note 3, ¶ 6(4).
with the provisions contained in the Convention.”\textsuperscript{13} In keeping with its focus on the conduct of the responsible government agencies, the German legislation provides no penalties for violations by individuals with respect to CBI.

The other national implementing legislation was unspecific on this matter. The Swedish implementing legislation apparently addresses CBI only for the purpose of affirming that the CWC’s confidentiality provisions would determine the method of protection where its standards differ from those of the submitter.\textsuperscript{14} The Norwegian implementing legislation does not explicitly address CBI protection during CWC verification activities at all.\textsuperscript{15}

\section*{3 CONCLUSIONS}

Provisions for protecting CBI are being included in the national CWC implementing legislation of some States. As summarised in Table 1, these requirements may be imposed on individuals or on government agencies, and could include measures for punishing violations. Further elaboration of CBI protections during CWC verification activities may become evident as additional national implementing measures are adopted.

Table 1: Comparison of Confidentiality Provisions in National Implementing Legislation

<table>
<thead>
<tr>
<th>STATE</th>
<th>CBI PROTECTION PROVISIONS</th>
<th>FINE</th>
<th>IMPRISONMENT</th>
</tr>
</thead>
<tbody>
<tr>
<td>Australia</td>
<td>X</td>
<td></td>
<td>X</td>
</tr>
<tr>
<td>Germany</td>
<td>X</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Norway</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>South Africa</td>
<td>X</td>
<td>X</td>
<td>X</td>
</tr>
<tr>
<td>Sweden</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

\begin{itemize}
\item[13.] \textit{Id.} \S 9(3).
\item[14.] See Summary of Swedish CWC Implementing Legislation, \textit{supra} note 6. This document indicates that the Swedish CWC Implementing Legislation addresses “how to ensure that confidentiality is respected in cases where Swedish confidentiality legislation sets a different standard than that of the provider of information. ... [by providing] that confidentiality with respect to information concerning the personal or economic affairs of individuals shall be subject to the provisions of treaties ratified by Parliament.” \textit{Id.} at 80.
\item[15.] See Norwegian CWC Implementing Legislation, \textit{supra} note 4. Presumably, this law’s authorisation to issue regulations could be used to create such protections. \textit{Compare id.} \S 1 with \textit{id.} \S 5.
\end{itemize}
4 QUESTIONS FOR CONSIDERATION

The following questions are intended to suggest various matters that States may want to consider in developing appropriate national implementing measures to protect CBI:

1. To what extent do local businesses rely on CBI to maintain a competitive advantage?
2. Is it feasible to embark on a national program to educate CBI owners about the CWC?
3. Will more effective CBI protection be achieved if CWC national implementing legislation focuses on government agencies, on individual government employees, or both?
4. Are fines, imprisonment, both, or neither appropriate penalties to deter unauthorised CBI disclosure?
5. If unauthorised CBI disclosure is to be penalised, how severe should the penalties be?

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