

ANL/DIS/CP--86455

Conf-9505207--1

The submitted manuscript has been authored by a contractor of the U. S. Government under contract No. W-31-109-ENG-38. Accordingly, the U. S. Government retains a nonexclusive, royalty-free license to publish or reproduce the published form of this contribution, or allow others to do so, for U. S. Government purposes.

**LEGAL ASPECTS OF NATIONAL IMPLEMENTATION
OF THE CHEMICAL WEAPONS CONVENTION
TRANSFER PROVISIONS**

presented to the

**Regional Seminar on the National Implementation of the
Chemical Weapons Convention**

Workshop IV: Export and Import of Chemicals

**Yamoussoukro, Cote D'Ivoire
10 May 1995**

presented by

**Edward A. Tanzman
Argonne National Laboratory
9700 South Cass Avenue
DIS-900
Argonne, IL 60439-4832, USA
011-708-252-3263 (voice)
011-708-252-5327 (fax)**

**Professor Barry Kellman
DePaul University College of Law
25 East Jackson Boulevard
Chicago, IL 60604, USA
011-312-362-5258 (voice)
011-312-362-5182 (fax)**

The views expressed herein are those of the authors and not necessarily those of Argonne National Laboratory or its sponsors.

DISTRIBUTION OF THIS DOCUMENT IS UNLIMITED
RWR

MASTER

DISCLAIMER

Portions of this document may be illegible in electronic image products. Images are produced from the best available original document.

TABLE OF CONTENTS

1 INTRODUCTION	1
2 COMPARISON OF TRANSFER LEGISLATION	3
3 CONCLUSIONS	4
4 QUESTIONS FOR CONSIDERATION	4

Tables

Table 1: Comparison of Methods of Regulating Chemical Transfers in National Implementing Legislation	4
--	---

DISCLAIMER

This report was prepared as an account of work sponsored by an agency of the United States Government. Neither the United States Government nor any agency thereof, nor any of their employees, makes any warranty, express or implied, or assumes any legal liability or responsibility for the accuracy, completeness, or usefulness of any information, apparatus, product, or process disclosed, or represents that its use would not infringe privately owned rights. Reference herein to any specific commercial product, process, or service by trade name, trademark, manufacturer, or otherwise does not necessarily constitute or imply its endorsement, recommendation, or favoring by the United States Government or any agency thereof. The views and opinions of authors expressed herein do not necessarily state or reflect those of the United States Government or any agency thereof.

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

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 Convention¹ (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 export and import 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

1. The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, opened for signature Jan. 13, 1993, 32 I.L.M. 800 (1993) [hereinafter CWC].

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 transfer requirements. CWC legislation from Australia,² Germany,³ Norway,⁴ South Africa,⁵ and Sweden⁶ 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.

2. Chemical Weapons (Prohibition) Act 1994 (No. 26 of 1994) (assented to 25 February 1994) (hereinafter Australian CWC Implementing Legislation).

3. Implementation Act on the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction (2 August 1994), unofficial English translation provided to Edward A. Tanzman on 27 January 1995 by the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (hereinafter German CWC Implementing Legislation).

4. Law on the Implementation of the Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, undated unofficial English translation provided to Anthony R. Zeuli on 16 November 1994 by the Preparatory Commission for the Organisation for the Prohibition of Chemical Weapons (hereinafter Norwegian CWC Implementing Legislation).

5. Non-Proliferation of Weapons of Mass Destruction Act of 1993 (No. 87 of 1993), 337 *Government Gazette* No. 14919 (2 July 1993) (hereinafter South African CWC Implementing Legislation).

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.

2 COMPARISON OF TRANSFER LEGISLATION

Four parts of the Convention — Article I, paragraph 1(d), Article VI, paragraph 2, Article XI, paragraph 2(e), and Article VII, paragraph 1 — contain CWC provisions regarding chemical transfers. Chapter 3 of the *Manual* explains these in some detail. This paper discusses how different States have implemented the Convention's restrictions on transferring chemicals listed on one of the three schedules in the Annex on Chemicals.

Two distinct methods of regulating chemical transfers are revealed by the five national implementing statutes that were analysed. First, a national government can prohibit, limit, or license the *act* of transferring scheduled chemicals. Second, it may prohibit, limit, or license the *operation of any facility* that transfers scheduled chemicals.

The five statutes that were reviewed show how these two methods can be applied in different combinations to achieve the Convention's goals. The German and South African legislation explicitly address *both* the act and the operation of facilities that transfer scheduled chemicals.⁷ In very similar language, these two laws provide for prohibiting or limiting imports, exports, transit, or re-export of scheduled chemicals. Permits may be required before such activities are allowed, and these permits can impose conditions on the permitted acts, such as providing end-use certificates to the government. In addition to regulating these acts, the German and South African statutes also govern facilities that possess scheduled chemicals. These laws make continued operation of affected facilities subject to acquiring government permits, which may impose conditions on their continued operation. The Norwegian legislation is also quite broad, but does not specifically address *either* acts or facilities regarding transfers.⁸

In contrast, the Australian and Swedish national implementing measures each use a single one of these methods.⁹ The Swedish law governs only the actual export or import of the chemicals, amending various existing import and export licensing laws to accommodate them to the CWC. Rather than regulating the transfer itself, the Australian statute requires facilities that may fall under the Convention's requirements with respect to Article VI to obtain a government permit¹⁰ and makes qualifying for such permits subject to compliance with the Convention's transfer restrictions.¹¹

7. Compare German CWC Implementing Legislation, *supra* note 3, ¶ 2, with South African CWC Implementing Legislation, *supra* note 5, § 13.

8. See Norwegian CWC Implementing Legislation, *supra* note 4, ¶ 1.

9. Compare Australian CWC Implementing Legislation, *supra* note 2, § 22, with Summary of Swedish CWC Implementing Legislation, *supra* note 6, at 75-77.

10. See Australian CWC Implementing Legislation, *supra* note 2, § 16.

11. See *id.* § 22.

3 CONCLUSIONS

The different approaches summarised in Table 1 show how CWC national implementing legislation can address the Convention's transfer restrictions. The question of which of these methods may be advantageous in a particular State may depend on both the nature of the relevant industries and of the government structure. States may want to consider their particular circumstances in making this determination.

Table 1: Comparison of Methods of Regulating Chemical Transfers in National Implementing Legislation

STATE PARTY	REGULATE ACT OF TRANSFERRING	REGULATE FACILITIES
Australia		X
Germany	X	X
Norway	unspecific	unspecific
South Africa	X	X
Sweden	X	

4 QUESTIONS FOR CONSIDERATION

The following questions are intended to suggest various matters that States may want to consider in developing national implementing measures to comply with the Convention's transfer restrictions:

1. How are exports or imports presently regulated?
2. How are facilities that export or import various goods presently regulated?
3. What quantities of scheduled chemicals are likely to be exported or imported in the foreseeable future?
4. How many facilities might be exporting or importing scheduled chemicals in the foreseeable future?
5. Are law-abiding individual or corporate persons likely to prefer one form of regulation over another?