

**EFFECTIVE IMPLEMENTATION
OF THE
CHEMICAL WEAPONS CONVENTION**

**Facility Agreements and Model Facility Agreements under the
Chemical Weapons Convention**

**by Y. von Lersner, T. Kurzidem,
P. Radler, T. Stock and R. G. Sutherland**

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YORK VON LERSNER, THOMAS KURZIDEM, PATRICIA RADLER,
THOMAS STOCK AND RONALD G. SUTHERLAND

I. Introduction

Facility Agreements, which by nature are international law agreements, are of major importance for chemical industries and thus, do, to some extent, affect the implementation process of the CWC. This paper attempts to evaluate and analyze the most important aspects relating to Facility Agreements under the CWC in the context of future inspections activities, that will be conducted by the Organisation for the Prohibition of Chemical Weapons (OPCW). Under the CWC routine on-site inspections and systematic on-site inspections will be conducted for industrial facilities, chemical weapons production facilities (CWPFs), chemical weapons destruction facilities (CWDFs), chemical weapons storage facilities (CWSFs) and sites with old and abandoned chemical weapons (OCW and ACW). For these activities the Convention foresees the conclusion of Facility Agreements between a State Party and the OPCW which are related to a specific facility subject to on-site inspections. The paper also studies some national implementation legislation as regards Facility Agreements.

II. Facility Agreements and the CWC

Under the Convention the term Facility Agreement is defined as ‘an agreement or arrangement between a State Party and the Organization relating to a specific facility subject to an on-site verification pursuant to Articles IV, V, VI’.¹ The purpose of such a Facility Agreement, which will be concluded between the State Party, i.e., the National Authority, and the Technical Secretariat of the OPCW and subject to approval by the Executive Council,² is to govern the activities of both the inspected site and the international inspection team. It shall (a) facilitate future inspections; (b) protect confidential business information; and (c) secure that the time-frames for the inspections can be kept.

Pursuant to paragraph 8 of Part II of the Verification Annex, Facility Agreements shall be negotiated on the basis of model Facility Agreements. Model Facility Agreements are defined as ‘document(s) specifying the general form and content for an agreement concluded between a State Party and the Organization for fulfilling the verification provisions...’.³ A model agreement has to be held in general terms and serve as a negotiation basis for the conclusion of more detailed Facility Agreements between States Parties and the OPCW.

As Facility Agreements will govern activities during on-site inspections, the following parties will be involved in the negotiating process: a) management of the facility; b) National Authority; and c) the Technical Secretariat of the OPCW.

The agreements agreed upon will have to balance the needs of confidentiality (to protect business information) and limitation of intrusiveness against the need to demonstrate compliance with the obligations under the CWC.

¹ Verification Annex Part I paragraph 7.

² Article VII paragraph 34 c) of the CWC.

³ Verification Annex, Part I, paragraph 19.

III. Inspections and Facility Agreements

As the Convention foresees different types of on-site inspections, one has to indicate for which facilities a Facility Agreement is required. The basic obligations for on-site inspections are to grant access to a facility and to avoid undue intrusion into activities of the inspected facility and not prohibited under the CWC⁴ These two obligations have to be balanced in the Facility Agreement.

Facility agreements are required to conduct systematic verification through on-site inspections and monitoring with on-site instruments for: chemical weapons (CW) (including old CWs and abandoned CWs), CWPFs, CWSFs and CWDFs, and single small-scale facilities (Schedule 1 chemical production).

Facility Agreements are also required for Schedule 2 facilities, that will be controlled by means of data monitoring and on-site verification. Schedule 3 and other facilities are not required to conclude a Facility Agreement but may request one.

Part III of the Verification Annex provides the general provisions for verification measures including Facility Agreements. For the attainment of Facility Agreements the following concept will apply in general: promptly after a facility is declared an initial inspection takes place for facilities subject to systematic on-site verification and monitoring by instruments. After that inspection a Facility Agreement has to be agreed upon within specific time-frames. The time-frame depends on the relevant Articles of the CWC for the facility.

Regime for Schedule 1 Chemicals

For facilities of this category, i.e., CWPF, CWDF, CWSF and Schedule 1 facilities, a Facility Agreement has to be concluded not later than 180 days after the CWC entered into force or after the facility has been declared for the first time.⁵ This requires that the initial inspection will be accomplished in due time. Otherwise the information the initial inspection, which is the basis for the Facility Agreement- negotiation, cannot be used. Further verification will then be carried out by on-site inspections, governed by the Facility Agreement for that specific facility. These inspections have to verify that the declared quantities of Schedule 1 chemicals are correct and that their aggregated sum not exceed 1 tone.⁶

Regime for Schedule 2 Chemicals

Any facility under the control of a State Party that produces, possesses or consumes Schedule 2 chemicals will be subject to the Verification regime for Schedule 2 chemicals. The regime requires that an initial inspection takes place as soon as possible after the facility has been declared, preferable not later than three years after the declaration.⁷ Based on the information of this inspection and the model agreement a Facility Agreement has then to be concluded not later than 90 days after the completion of the inspection.⁸ The Facility Agreement will govern the subsequent routine inspections. Different from the Schedule 1 regime and due to the wider time-frame, the negotiations of the Facility Agreement can begin before the initial inspection takes place. Further, the OPCW and the inspected State Party can agree that a Facility

⁴ Article IV paragraphs 9 and 10 of the Convention.

⁵ Part III of the Verification Annex paragraph 4.

⁶ Verification Annex, Part VI paragraph 21.

⁷ Part VII of the Verification Annex paragraph 16.

⁸ Part VII of the Verification Annex paragraph 24.

Agreement is not needed for a certain declared plant site.⁹

The purpose of the inspection regime is to verify the non- production of Schedule 1 chemicals, the correctness of the declared information and the non- diversion of Schedule 2 chemicals for purposes prohibited under the CWC. In this respect the importance of a suitable Facility Agreement for the facility and the Organization has to be emphasized, especially if one takes the short time limit, i.e., 96 hours for these inspections into account.

Regime for Schedule 3 and other chemicals

Schedule 3 and other chemicals, which are subject to on-site inspections,¹⁰ represent the exception to the above mentioned concept. In general, a Facility Agreement required under the Convention. However, a Facility Agreement can be prepared upon request of a State Party.¹¹ This point may be of importance to commercial plant sites. Without a Facility Agreement there is no limitation for the inspection teams' access to the plant site, except through managed access. So any scheduled or other facility owner who foresees difficulties in negotiating plant site access may ask the National Authority to request the development of a Facility Agreement. But it must be mentioned that industry does not recommend a Facility Agreement for Schedule 3 facilities since the odds of a routine inspection does not warrant the effort involved in the conclusion of a Facility Agreement.¹²

IV. Model Agreements

It is outlined in the Verification Annex that Facility Agreements are to be based on models that govern the conduct of inspections in detail at a specific plant site. The Expert Group on 'Declarations and Model Facility Agreements' in the PrepCom has developed and drafted various model Facility Agreements.¹³ But these model agreements are still under review. A draft (of 27 Feb. 1995) is currently under consideration for Schedule 2 facilities. Once the model Facility Agreements are agreed upon, they have to be adopted by the Conference of States Parties at its First Session.

The purpose of these model agreements are many. The most important one is of course, on the one hand, as far as possible, a uniform application of the OPCW inspection regime in order to ensure equitable treatment and, on the other hand, to be flexible enough to take the specific circumstances of each facility into account. Further, this concept should reduce the cost for industry involved in the negotiation of the actual Facility Agreement. Finally, the model agreement provides for the facility management a reasonable predictability as concerns the actions taken by inspectors during any following inspection.¹⁴

Due to the fact that the model agreement is the basis for conducting negotiations of an actual Facility Agreement, it became obvious that not one model agreement can be developed for all different facilities. Thus, various model agreements have to be developed, which are facility-type related and refer to a well defined category of facilities.¹⁵

⁹ Part VII of the Verification Annex paragraph 24.

¹⁰ See for that Part IX of the Verification Annex paragraph 1.

¹¹ Part IX of the Verification Annex paragraph 16.

¹² See Paper present by Peter J. Plant, at page 2.

¹³ See for example the 'Expert Group on Declarations and Model Facility Agreements: First report', PC-VI/B/WP.16, 25 March 1994.

¹⁴ Paper presented at the combined industry meeting at the Hague, 25-27 June 1995 at p. 1.

¹⁵ The work of the Expert Group focuses therefore mainly on Schedule 2 model Facility Agreements at the moment.

V. National Authority and Facility Agreements

Facility Agreements will be concluded directly between States Parties and the OPCW and thus, be international legal documents. However, the usual situation will be that the National Authority, on behalf of the State Party, and the Technical Secretariat, on behalf of the OPCW, will negotiate and conclude Facility Agreements. The importance of a Facility Agreement for the conduct of on-site inspections and the direct effect on the inspected facilities poses diverse tasks to the National Authority.

Tasks of National Authorities as regards Facility Agreements

(1) As the purpose of a Facility Agreement is to ensure effective verification measures by the inspection team as well as sufficient protection of the interest of the facility, the National Authority has to mediate with both sides - the facility management and the Technical Secretariat - while conducting negotiations of the Facility Agreement.

(2) A major task of the National Authority will be to make the Model Facility Agreement operational on a national level. Due to the general nature of model Facility Agreements, they have to be adopted to the specific conditions of the State Party concerned. Thus, a concept has to be developed, which complies with OPCW requirements and make the Facility Agreement operational at the national level. This requires that the National Authority identifies areas, where a uniform approach can be taken and where specific regulations are required by the facility.

(3) For the preparation of Facility Agreements at a national level the National Authority has to identify all potential facilities, including Schedule 3 and other chemical facilities for which a Facility Agreement may be needed. This can be done on the basis of declarations by facilities due to the national legislation requirements. A second step of the National Authority is to enter into consultations with the identified facilities, explaining their obligations and rights of the management. This requires that the management is prepared to spend significant amount of time in the preparation of a Facility Agreement and is given a say in the conclusion of it.

(4) The National Authority has further to prepare for the initial inspections. In this respect the National Authority has to prepare the management of a facility for the various activities carried out by the international inspection team as well as to ensure that the declared information, on which the initial inspection is based, is correct. Insufficient or incorrect information will certainly have a negative impact on negotiation of a Facility Agreement. For the concerned facility this could mean a tighter inspection mandate for future inspections, for the concerned State Party a loss of confidence at a political level. To find out about the correctness of the information, the National Authority has to rely on consultations with the facility management, as national inspection rights for a National Authority is not required under the CWC and thus, mostly not to be found in implementation legislation. In most cases facility management will co-operate in this respect, especially after they become fully aware about the consequences of non-compliance. However, this might not be true for all cases. In order to prevent an initial inspection being conducted on the basis of insufficient information, it might be useful to empower the National Authority with inspection rights, at least for an intermediate period of time.¹⁶

All tasks listed above are rather time and staff consuming, especially for countries with a large number of facilities, subject to the requirement of a Facility Agreement. Thus, States Parties have to take this into account in the planning of the establishment of the National

¹⁶ The implementation Act of Australia provides for the conduct of national compliance legislation carried out by national inspectors, although this is not specifically mentioned in the Act.

Authority.

V. National legislation concerning Facility Agreements

The most advanced and comprehensive regulation regarding Facility Agreements can be found in the US draft implementing legislation, Section 401 (f) of which reads as follows:

(1) Inspections of plants, plant sites, or other facilities or locations for which the United States has a Facility Agreement with the Organization for the Prohibition of Chemical Weapons shall be conducted in accordance with the Facility Agreement.

(2) Facility Agreements shall be concluded for plants, plant sites, or other facilities or locations that are subject to inspection pursuant to paragraph 4 of Article VI of the Chemical Weapons Convention unless the owner and the operator, occupant or agent in charge of the facility and the Technical Secretariat agree that such an agreement is not necessary. Facility Agreements should be concluded for plants, plant sites, or other facilities or locations that are subject to inspection pursuant to paragraph 5 or 6 of Article VI of the Chemical Weapons Convention if so requested by the owner and the operator, occupant or agent in charge of the facility.

(3) The owner and the operator, occupant or agent in charge shall, to the extent practicable consistent with the obligations of the United States under the Chemical Weapons Convention, participate in the negotiation of all Facility Agreements concluded pursuant to the Convention.

The approach taken by the CWCIA in regard to Facility Agreements is the most comprehensive and progressive one in comparison to other legislation reviewed. Section 401 (f) of the CWCIA defines the role of facility owners in the negotiations process of Facility Agreements as being extensive. Paragraph 3 gives owners the right to participate in the procedure. It is not a question of whether or not such right exists, but rather the extent of this right as limited by practical and legal considerations. Paragraph 2 is even more interesting since it mentions a direct link between the owner of a facility and the Technical Secretariat for cases where a Facility Agreement for a Schedule 2 facility is found to be unnecessary. It goes without saying that this process would, of course, include the assistance of the National Authority. However, this provision is mainly intended to prevent that the National Authority may overrule the facility management, if the management wants to have a Facility Agreement.

The most important point in the current draft, however, is that it mentions the possibility of a request by an owner of a Schedule 3 facility or a facility producing other chemicals pursuant to Part IX of the VA to conclude a Facility Agreement. The wording ‘should conclude’ implies that the National Authority is not obliged to conclude such an agreement. However, since one of the main tasks of the National Authority will be to protect reasonable interests of its industry this provision is not likely to be ignored if it enters into force in its current form. This reflects the general approach of the US draft implementing legislation to give the protection of private property top priority.

Other legislation reviewed, so far, takes a less advanced approach. In Germany, Article 13 of the Implementation Act empowers the Export Control Office to negotiate Facility Agreements with the OPCW and to conclude such arrangements with the OPCW in co-ordination with the Ministries of Foreign Affairs and Economics. In cases where there is an obligation to conclude a Facility Agreement, the National Authority is requested to consult with the management of the

affected facility before the negotiations of a facility Agreement with the OPCW starts. In all other cases, i.e., Schedule 3 facilities and other chemical facilities, prior consent of the facility management is required. The most interesting aspect of this regulation is that it establishes certain important rights for the owner of a facility, most important the right to participate in the procedure and to be kept informed about the process.

Section 76 of the Australian Act specifically deals with Facility Agreements and assigns to the Minister of Foreign Affairs the powers to negotiate and conclude Facility Agreements with the OPCW and gives him wide discretion regarding the contents of a Facility Agreement. However, Section 76 makes no indication of what role facility owners should have in this procedure. The fact that facility owners are not granted specific procedural rights under this act, however, does not necessarily mean that they have no rights at all. The extent of their participation will depend both on practical and legal considerations.

Neither the Dutch nor the Swedish implementing legislation, this far, includes any regulation regarding this problem. The Swedish Act on Inspections gives the inspection team very broad rights in the inspection process and in the 'travaux preparatoires' it states that the Government or a designated authority, i.e., the National Authority, shall take necessary decisions during inspections. As concerns Finland the conclusion of facility Agreements are only stated indirectly. The 'travaux preparatoires' to the Finnish CWC Act state the need of facility Agreements. Reasons why Finland nor Sweden provide direct legislation as regards the conclusion of Facility Agreements is probably because they have very few, if any, facilities that require such agreements.