

**EFFECTIVE IMPLEMENTATION
OF THE
CHEMICAL WEAPONS CONVENTION**

**Chemical trade and Article XI of the CWC: Some
Comments**

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Chemical trade and Article XI of the CWC: Some Comments

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I. Introduction

Article VII—National Implementation Measures—is quite general in its wording and leaves it up to individual States Parties to decide how they will implement the provisions of the Chemical Weapons Convention (CWC). The size and stage of development of the chemical industry in a country will have a major impact on such decisions, as will many other factors. There are two major functions of the National Authority under the Convention: (a) the requirement to establish a system which can meet the obligations of the State Party, and (b) the ability to provide the chemical industry of the State Party with the assurance that no disclosure of confidential information should occur in the process of providing the information requested to the International Organization.

One of the most important functions of the National Authority is to meet the almost continuous data-reporting requirement for the State Party, including data-reporting on scheduled chemicals, data on unscheduled discrete organic chemicals including ‘PSF’ chemicals and data on research activities under the Convention. The National Authority will be responsible for three different types of data reporting: (a) the initial declarations of the State Party after entry into force of the Convention, (b) annual data reporting, and (c) reporting on anticipated activities and changes in activities reported previously. There will be a need to ensure that such data are retrievable, authorized and assessable at the National Authority level. Included in the data reporting is information on chemical trade, both export and import, for chemicals listed under the Schedules. The information which has to be submitted regarding trade of chemicals is specified in the Verification Annex under Part VI, VII, VIII. In relation to the trade of chemicals under the CWC, Article XI is important because it specifies that States Parties shall ‘undertake to facilitate, and have the right to participate in, the fullest exchange of chemicals, equipment and scientific and technical information relating to the development and application of chemistry for purposes not prohibited under this Convention’.

This paper will not deal in depth with the discussion and possible solutions on the debate about Article XI. It will deal more with the States Parties obligations in the direction of trade with chemicals.

II. Export control measures and Article XI—the debate

A primary controversy as regards the future of export control regulations is whether: (a) to keep existing export control measures at various levels (national, regional, and international, such as the Australia Group) until the States Parties have evidence that an export control system functions under the CWC; or (b) upon entry into force to review all existing measures and abandon organizations such as the Australia Group. The subject is highly politicized, controversial and sensitive because it involves different views on the CWC: (a) the CWC as a non-proliferation treaty, (b) the CWC as a treaty for development, or (c) the CWC as a treaty to facilitate trade with chemicals and technology.

After the CWC was concluded the debate continued in the PrepCom on Article XI. Controversy on this issue is related, on one hand, to the position of some states that Article XI should ensure the ‘free and unhampered transfer of chemicals’ for peaceful purposes and, on the other hand, to the position that future CWC members are bound under Article I not to ‘assist . . . anyone to engage in any activity prohibited to a State Party’ and on the right of states to determine their own national export policies. However, more recently the debate turned to a more positive approach by considering the development of an Article XI database to facilitate the exchange of information related to economic and technological development in the field of chemistry.¹

It may be useful to recapitulate briefly how the CWC deals with the transfer or trade of chemicals. In the CWC four articles address this area, directly or indirectly:

1. Article I, paragraph 1(a): each State Party undertakes never to ‘transfer, directly or indirectly, chemical weapons to anyone’; and paragraph 1(d): each State Party shall not ‘assist, encourage or induce, in any way, anyone to engage in any activity prohibited to a State Party under [the CWC]’.

2. Article VI, paragraph 2: each State Party ‘must adopt necessary measures to ensure that toxic chemicals and their precursors are only developed, produced, otherwise acquired, retained, transferred, or used within its territory or in any other place under its jurisdiction or control for purposes not prohibited under [the CWC]’.

3. Article VII, paragraph 1(c): each State Party shall ‘extend its penal legislation enacted under subparagraph (a) to any activity prohibited to a State Party under this Convention undertaken anywhere by natural persons’.

4. Article XI, paragraph 2(e): each State Party is required to ‘undertake to review their existing national regulations in the field of trade in chemicals in order to render them consistent with the object and purpose of the [CWC]’.

¹ This was based on the PrepCom’s request for a PTS study on that issue (see: Note by the Executive Secretary, ‘Request for data on types of information to be contained in a possible database to be established under Article XI’, PC-IX/B/1, 13 Oct. 1994) and a paper submitted by Australia (see: ‘Non-paper: Information for Article XI Database’, 6 Nov. 1994). For more information see also: Note by the Executive Secretary, ‘An end-user survey of information requirements to facilitate information exchange in relation to Article XI’, PC-XI/B/3, 13 Apr. 1995.

5. Article XI, paragraph 2(d): each State Party shall not use this Convention to apply measures 'other than those provided for, or permitted, under this Convention...'

III. Transfer of chemicals under the CWC

The detailed obligations for the transfer of scheduled chemicals are presented in the Parts VI, VII and VIII of the Verification Annex. The general principle applied is: *Any transfer of scheduled toxic chemicals or their precursors among States Parties must be for purposes not prohibited under the CWC.* The specific principles for the three schedules are described in the following discussion.

Schedule 1

For Schedule 1 chemicals, only transfer for non-prohibited purposes to States Parties is allowed; transfer to non-States Parties will generally be prohibited. If transfer takes place, the following information is required: (a) the chemical name, structural formula, and Chemical Abstract Service registry number; (b) the quantity acquired from other states or transferred to other states; and (c) for each transfer, the quantity, recipient and purpose. The Technical Secretariat must receive a notice at least 30 days in advance of any such transfer. Annual declarations have to be provided on transfers of Schedule 1 chemicals. Re-transfer to another state is not allowed.

For transfer of chemicals on schedules 2 and 3, the CWC takes a twofold approach requiring: (a) specific declarations on transfer (export) to states in general; and (b) specific declarations on transfer (export) to states not parties to the CWC.

Schedule 2

For Schedule 2 chemicals above the declaration threshold,² information (aggregate national data) has to be submitted in the annual declarations on the total amount exported in the previous calendar year. In addition a quantitative specification of export for each country has to be given. For a plant site, besides the annual declaration on previous year exports, the anticipated (for the following calendar year) exports have to be submitted, including a specification of the states to which export was/will be made.

For Schedule 2, if export is to a state which is not a party to the CWC, export can only occur for three years after entry into force of the CWC; thereafter transfer will be permitted only to States Parties to the CWC. In this interim period transfer to non-States Parties will be allowed if end-use certificates are

² The thresholds are: Schedule 2A* = 1 kilogram, Schedule 2A = 100 kilograms, Schedule 2B = 1 tonne.

presented. The certificate has to include: (a) a statement by the recipient state that the chemical will only be used for permitted purposes, (b) assurance that the chemical will not be re-transferred, (c) the types and quantities of the chemical, (d) its end-use(s), and (e) the name(s) and address(es) of the end-user(s).

Import or export of Schedule 2 chemicals are not subject to quantity limitation.

Schedule 3

For Schedule 3 chemicals above the declaration threshold,³ information has to be submitted in the annual declarations for the previous calendar year on aggregate national data for export of each chemical and specification of export for each country. There are no quantity limitations on the transfer of Schedule 3 chemicals.

For Schedule 3 an interim period of five years is built into the CWC, in which transfers to non States Parties are possible. The existing regulations for the transfer of chemicals have to be reviewed after these 5 years with consideration given to whether new measures have to be applied. In contrast to the prohibition of transfer of Schedule 2 chemicals to non States Parties after 3 years, the CWC only requires consideration of the need for 'other measures' on Schedule 3 transfer. In the interim period, transfer to non States Parties will be allowed if end-use certificates are presented. The certificate shall include: (a) statement by the recipient state that the chemical will only be used for purposes not prohibited under the CWC, (b) insurance that the chemical will not be re-transferred, (c) types and quantities of the chemical, (d) end-use(s); and (e) name(s) and address(es) of the end-user(s).

IV. Obligations in the process of national implementation

There are two obligations related to the transfer of schedules 2 and 3 chemicals for an individual State Party under the CWC: (a) if transfer takes place to a State Party it has to be assured that the required information (see above) is available; (b) if transfer takes place to a state not party to the CWC, end-use certificates must be obtained.

If a State Party can confirm that the required information will be obtained under its existing transfer regulations (export regulations), the State Party may retain its transfer regulations for Schedule 2 and 3 chemicals for at least 3–5 years. It will not be forced to change its existing regulations in order to meet the reporting obligations under the CWC. After 3 years the transfer of chemicals under Schedule 2 to non States Parties will no longer be allowed. What will happen to the transfer regulations regarding Schedule 3 chemicals after 5 years is still an open question.

³ The threshold for Schedule 3 is 30 tonnes.

Article XI, paragraph 2(c), must be recalled in any discussion of export controls. It recommends that States Parties shall:

Not maintain among themselves any restrictions, including those in any international agreements, incompatible with the obligations undertaken under this Convention, which would restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes.

Although this obligation is general, an individual State Party has to consider it when deciding the form its national trade and transfer control system should take. The approach is twofold: States Parties undertake to 'review their existing national regulations' with the purpose 'to render them consistent with the object and purpose of this Convention', and also pledge to implement the Convention in a manner which does not hamper the 'economic and technological development' of other States Parties.

A State Party must establish an export control system which allows for both strengthening and relaxing controls, depending on the country (State Party or non State Party to the CWC) to which the transfer is being made, and the export control measures that already exist. The effectiveness of any control-system will naturally depend on the ability of the government of a State Party to ensure that industry and customs—through which any chemical product will have to pass—comply with new and existing legislation.

A number of countries have already established export control measures, and the wording of the CWC—'undertake to review their existing national regulations in the field of trade in chemicals'—provides additional guidance. Thus, the following tools for a system of export controls might be considered: (a) export licences, (b) end-use statements, (c) re-export certificates, (d) post-shipment checks, (e) import controls, (f) in-transit shipment controls, and (g) control of technology transfer.

Existing legislation (such as the penal code of a country, customs act, international trade law, and the like) may be adequate, may have to be amended or alternative acts or legislation may need to be created. In most countries, national law supersedes international law, therefore national legislation has to be approved to incorporate an international treaty such as the CWC. Then the provisions of the treaty can be applied equally as other national legislation.

Already as States Parties are preparing implementation legislation there is a need to consider the requirements of the CWC for the control of exports of chemicals. Countries will have to review and adjust their existing regulations to meet their obligations under the CWC. They will also have to keep in mind that after 3 or 5 years the need may arise to address new requirements related to the transfer of Schedule 2 and 3 chemicals to States Parties and non States Parties.

Lastly, it should be recalled that a State Party under the CWC always has the right to export chemicals if this is done in accordance with the obligations assumed under the CWC.

V. International co-operation and Article XI

Some of the signatory nations and their chemical manufacturers may not have had extensive experience in reporting of information or of being subject to international inspections. There will be initial difficulties for them in fulfilling their obligations, including the control of the transfer of chemicals, under the Convention.

Questions of co-operation and possible harmonization in the area of export control measures will be of importance since major chemical enterprises often have facilities located on the territory of more than one State Party. Certain rules and procedures for inventorying on the national level may create concern in some States Parties about competition and confidentiality within chemical industry.

Here the regional chemical industry associations could be of assistance in addressing such concerns. Other areas for active involvement by chemical industry associations could include: (a) providing general assistance and support, (b) supporting and providing information to individual countries in their legislative activities related to export regulations, (c) exchange of experience and expertise, (d) aiding individual countries in their efforts to set up a National Authority and the necessary data reporting system, and (e) assisting the training of specialists for the National Authority data auditing.

The CWC could serve as a vehicle to review and improve existing trade regulations dealing with chemicals and equipment and also help to strengthen efforts to harmonize regulations related to the export of dual-use goods. A common policy for the harmonization of export control regulations, as for example in the EC, is currently receiving increasing attention and will gain additional momentum, when the CWC enters into force. An active role can clearly be taken in the implementation process and the co-ordination of common undertakings by countries which may be organized in associations, national and regional chemical manufacturers associations (such as the Confédération Européenne des fédérations d'industrie chimique—CEFIC—in Europe, the CMA in the USA, the CCPA in Canada and the Japanese Chemical Trade Association) or groups of countries in a region, such as those in South America.

Annex I. Transfer of chemicals under the CWC

Schedule 1

limitation: < 1 tonne

transfer only between States Parties

declaration of transfer with information on:

(a) the chemical name, structural formula, and Chemical Abstract Service registry number;

(b) the quantity acquired from other states or transferred to other states; and

(c) for each transfer the quantity, recipient and purpose shall be included.

Schedule 2

limitation for declaration: >1 kg (for BZ) or >100 kg for chemicals from Schedule 2, part A; >1 tonne for chemicals from Schedule 2, part B;

during first three years after the CWC enters into force:

transfer to both States Parties and non-States Parties is allowed;

for *transfer* to non-States Parties during first three years end-use certificate is required which shall include statement:

(a) by the recipient state that the chemical will only be used for purposes not prohibited;

(b) that the chemical will not be re-transferred;

(c) of types and quantities of the chemical;

(d) of end-use(s); and

(e) of the name(s) and address(es) of the end-user(s).

for *transfer to States Parties* the recipient State Party has to report on imported chemicals and the exporting State Party has to report on the export in both the annual declaration on anticipated activities and the initial declaration about the previous three calendar years.

after *three years* transfer is allowed only to States Parties.

Schedule 3

limitation for declaration: >30 tonnes;

during first five years after the CWC enters into force:

transfer to both States Parties and non-States Parties is allowed;

for *transfer to non-States Parties* during first five years end-use certificate is required which shall include statement:

(a) by the recipient state that the chemical will only be used for purposes not prohibited;

(b) that the chemical will not be re-transferred;

(c) of types and quantities of the chemical;

(d) of end-use(s); and

(e) of the name(s) and address(es) of the end-user(s).

no possibility to trace the *transfer to States Parties*; there is an obligation that the producing State Party shall give information about the production purposes, which might contain transfer information;

after *five years* review regulations and consider the establishment of other measures.

