



NOTE BY THE DIRECTOR-GENERAL

**CERTAIN ISSUES RELATING TO THE DRAFT MODELS FOR
FACILITY AGREEMENTS FOR SCHEDULE 1 FACILITIES AND
SCHEDULE 2 PLANT SITES SUBMITTED TO THE CONFERENCE FOR ITS
CONSIDERATION AND APPROVAL**

1. Introduction

- 1.1 With regard to unresolved issues 72(d) and 85, the Executive Council has approved draft models for facility agreements for Schedule 1 facilities (EC-XI/DEC.4, dated 4 September 1998) and for Schedule 2 plant sites (EC-XII/DEC.1, dated 9 October 1998), which have been submitted to the Conference for its consideration and approval.
- 1.2 The Director-General wishes to draw the attention of Member States to issues relating to two provisions in the draft models which, in the opinion of the Technical Secretariat, should be considered by Member States when reviewing the draft model agreements.

2. Debriefing and preliminary findings

- 2.1 The draft models for facility agreements provide that the representative of the inspected State Party shall be provided with the inspection team's preliminary findings "in written form sufficiently prior to the conclusion of the debriefing to permit the inspected State Party to prepare any comments and clarifications" (Section 9(3) of the draft model for Schedule 1 facilities, and Section 8(3) of the draft model for Schedule 2 plant sites). In the view of the Secretariat, there is no need for such provision because, in accordance with the Convention and with inspection practice, inspectors are normally fully apprised of the inspected State Party's comments and clarifications by the end of the inspection period and when preparing the preliminary findings during the debriefing period. As currently drafted, the provision in the draft models may prejudice the work of the inspection team on the preliminary findings within the 24-hour period allocated for that purpose by paragraph 60 of Part II of the Verification Annex.

- 2.2 It is recalled that the Convention does not specifically recognise the right of the inspected State Party to provide comments on the preliminary findings before the end of the debriefing. The Convention only provides, in paragraph 60 of Part II of the Verification Annex, that the representative of the inspected State Party shall countersign the preliminary findings “to indicate that he has taken note of the contents of the document”. The inspected State Party may provide written comments on the final inspection report in accordance with paragraph 63 of Part II of the Verification Annex.
- 2.3 The Convention requires the inspection teams to keep States Parties informed of progress at every stage of the inspection. In the performance of its duties, the inspection team is normally accompanied by representatives of the inspected State Party (paragraph 41 of Part II of the Verification Annex), who observe all verification activities carried out by the inspection team (paragraph 49 of Part II). In addition, throughout the inspection period, the inspection team must give the inspected State Party, upon request, copies of information and data gathered about the facility (paragraph 50 of Part II). The inspection team is required to make requests for clarifications in connection with ambiguities promptly in the course of the inspection, and the inspected State Party shall provide clarifications of such ambiguities during the inspection (paragraph 51 of Part II of the Verification Annex).
- 2.4 In the experience of the Secretariat, there are no past Schedule 1 or 2 inspections in which the above-mentioned requirements of the Convention were not adhered to. Substantive unresolved issues are not normally left by the inspection team until the debriefing. Accordingly, it has not been necessary for any inspected State Party to prepare clarifications as late as the debriefing. In past inspections, comments of the inspected State Party have often been incorporated into the preliminary findings (the Secretariat’s preliminary findings format contains a section for such comments in Annex O).
- 2.5 In view of the above, the Secretariat would recommend amending the terms of the relevant paragraph, in conformity with the text of facility agreements for chemical weapons production and storage facilities approved by the Executive Council (see annexes to EC-IX/DEC.1/Rev.1 and EC-IX/DEC.2/Rev.1, both dated 24 April 1998), to read as follows:

“Before the conclusion of the meeting the inspected State Party may provide written comments and clarifications to the inspection team on any issue related to the conduct of the inspection. These written comments and clarifications shall be attached to the document on preliminary findings.”

3. The liability clause

Introduction

- 3.1. Although the issue of responsibility, and of any liability resulting from such responsibility, may be addressed with reference to the Organisation’s activities in general, it is of particular relevance to verification activities. The Secretariat would

therefore like to draw the attention of the States Parties to some aspects of the liability clause in the facility agreements and in the draft models for such agreements for Schedule 1 facilities and Schedule 2 plant sites.

- 3.2 All the facility agreements so far approved by the Executive Council, and the draft models, contain liability clauses referring to the reciprocal liability of the inspected State Party and the Organisation. The clauses in the draft models are, however, substantially different from the liability clauses in all the approved agreements, with the exception of the first three transitional facility arrangements. The basic difference is that the clauses in the approved facility agreements qualify and thus limit the liability, whereas the clauses in the draft model do not.
- 3.3 The liability clause in the two draft models provides that “[a]ny claim by the inspected State Party against the Organisation or by the Organisation against the inspected State Party in respect of any alleged damage or injury resulting from inspections at the plant site in accordance with this Agreement, without prejudice to paragraph 22 of the Confidentiality Annex, shall be settled in accordance with international law and, as appropriate, with the provisions of Article XIV of the Convention”. States Parties should therefore consider whether it would be appropriate to limit the extent of the liability by amending the clause in the models accordingly. The clauses in the approved facility agreements, for example, would protect both the inspected States Parties and the Organisation from having to accept claims based on simple negligence.

The legal context

- 3.4 As a starting point, “There is no question in view of the attribution of international personality to international organisations that they as persons, rather than the States members individually or in aggregate, can be the objects of international claims or suits” (C.F. Amerasinghe, “Principles of the Institutional Law of International Organisations”). Although the extent of the liability of international organisations resulting from their activities is far from clearly defined, the existence of such liability has, at least in principle, also been recognised by the international organisations. As an example, the International Atomic Energy Agency “... has always assumed that, under general principles of law, it would be liable to anyone injured by its fault or that of any staff member acting in the course of duty” (Paul Szasz, “The Law and Practice of the International Atomic Energy Agency”). It should also be mentioned that in view of the increase in the number and activities of international organisations, the International Law Association has recently established a Committee on the Accountability of International Organisations, to study and report on, inter alia, responsibility and liability.
- 3.5 Other international organisations have found it necessary to address the issue of potential liability and to take appropriate protective measures to supplement any provisions in constituent instruments or in agreements with Member States, by the inclusion of liability clauses in all types of contracts and agreements.

The responsibility and liability of the OPCW

- 3.6 The Chemical Weapons Convention does not address the general issue of liability, although it specifically states that the Organisation shall “... not be held liable ...” [emphasis added] for any breach of confidentiality committed by members of the Secretariat.
- 3.7 By accepting the jurisdiction of the Administrative Tribunal of the International Labour Organisation, the OPCW has accepted responsibility towards staff members, and the OPCW Interim Staff Regulations confirm the liability of the Organisation towards staff members and their families in case of service-incurred accident or illness.
- 3.8 The fact that the facility agreements contain liability clauses not excluding liability can also be seen as acknowledgement of potential liability related to on-site inspections. In the draft models, the extent and type of the liability is not addressed, whereas the approved facility agreements limit the liability to gross negligence or intent/wilful conduct.
- 3.9 This situation leaves two immediate questions to be addressed. The first is the possibility of a different liability of the Organisation towards different States Parties, which would seem inadmissible as a matter of principle. The second refers to the question of remedies for liability. Although largely theoretical - in view of the limited number of precedents of claims of liability against international organisations (except those brought by staff members) - the remedy (e.g. monetary compensation) could in a serious case probably not be covered from budgeted funds or by insurance. The Secretariat has therefore considered it a duty to try to limit the potential liability of the Organisation to the extent possible through the insertion of liability clauses in contracts and agreements, pending any further instructions from the policy-making organs on this issue.
- 3.10 The above is without prejudice to the fact that in most cases the Organisation would be protected against the effects of any liability by the immunities established in Section E of Article VIII of the Convention. The issues of immunity and responsibility are, however, normally treated separately, both in theory and in practice.