



Office of the Legal Adviser

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**LEGISLATION QUESTIONNAIRE:
PRELIMINARY ANALYSIS OF RESPONSES TO THE SURVEY
OF NATIONAL MEASURES TO REGULATE SCHEDULED CHEMICALS
UNDER THE CHEMICAL WEAPONS CONVENTION**

1. Introduction

1.1 At its Fifth Session, the Conference of the States Parties (hereinafter the “Conference”) issued a new mandate for assisting States Parties in their efforts to introduce implementing legislation (C-V/DEC.20, dated 19 May 2000). As one of the initiatives under this mandate, the Secretariat circulated a “legislation questionnaire” to all States Parties (S/194/2000, dated 8 June 2000). The twin aims of the questionnaire survey were as follows:

- (a) to determine the legal and administrative mechanisms that States Parties have established in order to implement the Convention; and
- (b) to identify the problems that some States Parties are facing as regards implementing legislation, and means of addressing them.

1.2 The survey was specifically designed in response to requests for assistance received from several States Parties which are in the process of drafting legislation. These States are seeking the most effective method of regulating scheduled chemicals and their precursors, both to facilitate the reporting required under the Convention, and to improve control of transfers of these chemicals. States Parties may also find the results of the survey useful in preparation for the special review session of the Conference (paragraph 22 of Article VIII, and paragraph 27 of Part VIII and paragraph 26 of Part IX of the Verification Annex), which shall be convened not later than 29 April 2003.

1.3 To date, the following 52 States Parties have submitted responses to the questionnaire: Algeria, Argentina, Australia, Austria, Azerbaijan, Bangladesh, Belarus, Bosnia and Herzegovina, Brazil, Bulgaria, Canada, Chile, China, Cook Islands, Costa Rica, Cuba, Denmark, Ethiopia, Finland, Georgia, Germany, Hungary, Italy, Kenya, Latvia, Mexico, Monaco, Namibia, Netherlands, Norway, Oman, Pakistan, Panama, Paraguay, Peru, Philippines, Republic of Korea, Romania, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Togo, Turkey, Ukraine, United

Kingdom of Great Britain and Northern Ireland, United States of America, Uruguay and Zimbabwe.

- 1.4 Thirteen of the responding States Parties had not previously submitted information on the legislative and administrative measures they have taken, as required under paragraph 5 of Article VII. In those cases the questionnaire responses provided the first concrete details of the legislative situation in those countries.
- 1.5 The Secretariat has begun the compilation and analysis of the responses, but this process will take some time to complete, since the questionnaire was quite detailed, and in some cases the Secretariat is seeking clarification of the responses submitted. The Secretariat will continue to urge the remaining States Parties to respond to the questionnaire, since a complete picture of the legislative situation in all States Parties is the goal of the exercise, and the information received so far has been useful. Some of the findings that have emerged from the preliminary analysis of responses submitted by 14 March 2001 are presented in the following.

2. Status of legislation

- 2.1 Of the 52 responding States Parties, 92% already have legislation in place. Only 8% of the respondents have no legislation at all with which to enforce the Convention.
- 2.2 Of those States that do have legislation in place, however, 40% are redrafting it or are drafting additional legislation or regulations to complete or improve what they already have in force. There are several reasons for this. A number of respondents indicated that they are amending their penal codes to introduce appropriate penalties. Others are establishing the necessary customs regulations to cover the Convention's requirements or the Conference decisions on low concentrations (C-IV/DEC.16, dated 1 July 1999; C-V/DEC.16, dated 17 May 2000; C-V/DEC.19, dated 19 May 2000), or they are amending or enacting legislation to reflect the prohibition on transfers of Schedule 2 chemicals to and from States not party, which took effect on 29 April 2000. One State provisionally issued executive orders to implement the Convention, pending their parliament's approval of national legislation.
- 2.3 The three basic criteria for assessing legislation are set forth in paragraph 1 of Article VII, which requires each State Party to adopt the necessary measures to implement its obligations under the Convention. In particular, each State Party shall: (a) enact the prohibitions, including penal legislation; (b) enforce them; and (c) extend their penal legislation extraterritorially to natural persons possessing their nationality. Depending upon the State's legal system, the Convention may be directly enforceable in the State's jurisdiction or the State may need to adopt separate implementing legislation. Bearing that in mind, of the responding States Parties with legislation in force:
 - (a) prohibitions:
 - 13% have not prohibited transfers of Schedule 1 chemicals or their precursors to or from States not party;
 - 36% have not prohibited transfers of Schedule 2 chemicals or their precursors to or from States not party;

- (b) enforcement:
- only 65% reported that they are enforcing the requirement for end user certificates;
 - 10% reported that they have no penalties in force with which to punish violations of Convention's requirements in respect of Schedule 1, 2 or 3 chemicals or their precursors; and
- (c) only 29% reported that they have extended their legislation extraterritorially.

2.4 Some of the respondents indicated that although they do not have the necessary prohibitions in force, they are nonetheless fully implementing the Convention's requirements, for example, through a licensing system whereby licences are only issued for purposes not prohibited under the Convention. One remark may be made in this respect: the **prevention of violations** is one aspect of implementation, while the **prosecution of violators** is quite another. Each State Party may ask itself whether, under its law, an individual can be prosecuted and/or penalised for a violation of a provision of the Convention?

3. Practical aspects of controlling scheduled chemicals

Identification of declarable facilities and plants

3.1 The survey responses indicate that the identification of declarable industry continues to be problematic. In many countries, industry databases are not up to date, or the national industry association does not enjoy the membership of all those who are involved in the chemical industry. One State reported that such detailed record-keeping by industry is not the normal practice and this obstacle is complex to overcome.

Low concentrations of Schedule 2 and 3 chemicals and their precursors

3.2 The reported low concentration thresholds vary from 0 to 200 kg for Schedule 2, and from 0 to 5 tonnes for Schedule 3 chemicals. The reported concentration limits also vary, from 1% to 30% for Schedule 2, and 0% to 30% for Schedule 3 chemicals. One State Party reported that it is not able to exercise effective control of mixtures containing low concentrations of Schedule 2 chemicals due to the lack of experience and inadequate software. The number of controlled chemicals is significant, and one low-concentration mixture may have up to 10 different trade names.

Import/export controls and the role of customs administrations

3.3 The majority of responding States reported that they have put in place import/export controls through licensing or permits. It is clear that the national customs administration is a key factor in implementation. Three States reported that a representative of customs has been assigned to their National Authority. Of the problems reported by States, some 72% related to the ineffectiveness of customs controls. In two cases, imports and exports of scheduled chemicals are not being controlled because the necessary regulations have not been put in place. Two States indicated that customs data is not reliable, or does not indicate the purity of the

substances; a parallel system is therefore used to request the information directly from the businesses involved. This solution is satisfactory to one State but not to the other. Five States specifically pointed to the inadequacy of the World Customs Organisation's Harmonised System (HS) codes for tracking imports and exports of scheduled chemicals. One of them has resolved this problem by using the HS codes together with the Chemical Abstracts Service (CAS) numbers, in order to be able to identify scheduled chemicals. Another State has successfully resolved the problem through surveys and extensive outreach by the National Authority. Unfortunately, not all National Authorities have the resources necessary to use that solution.

Free trade zones

- 3.4 Two States with free trade zones pointed out their special situation and indicated that their obligations under the Convention in respect of goods in transit are not clear. One member of the European Union (EU) pointed out that import/export figures cannot be compiled for transfers between EU members. One example given for discrepancies is the following: country A (not an EU member) exports a Schedule 2 chemical to country B (an EU member) and includes the export in its data declared to the OPCW. Before the chemical clears customs in country B, a trader in country C (also an EU member), sells the chemical to country D (not an EU member) directly, without bringing the chemical into country C. Neither country B nor country C include the data in their declarations to the OPCW, but country D does include the data in its declaration. In the data reported to the OPCW, therefore, there is no apparent link between country A's export and country D's import.

Integrated legislation

- 3.5 Of the States that have legislation in force, 18% have followed the integrated approach to legislation, with favourable results. These respondents cited a number of advantages of the integrated approach, including the following:
- (a) it respected the competencies of the various government organs involved in implementation;
 - (b) it enabled the use of the existing government structure as an effective means of controlling scheduled chemicals;
 - (c) it lightened the administrative burden;
 - (d) it allowed better coordination; and
 - (e) it enabled the Convention's regime to be merged into the existing import/export permit system.

Delay in enactment of implementing legislation

- 3.6 The respondents gave a variety of reasons for the delay in putting the necessary measures in place. One State Party cited the burden of tasks for the public sector and the legislature as its reason. Two States indicated that the complexity of the legislation and competing legal demands internally were preventing enactment. Another State is still studying the integration process. One State that is actively pursuing the integrated approach reported that the necessary consultations with all the stakeholders involved

(the chemical and pharmaceuticals industries, military, and the various ministries responsible for overseeing other chemical regimes) is a protracted process. For another respondent, the search for mechanisms of control that do not interfere or conflict with other international conventions or with existing national legislation was proving problematic.

- 3.7 The absence of a National Authority was cited by one State Party as the reason why it has no implementing legislation and is not controlling any aspect of activity involving scheduled chemicals. Another is still structuring, organising and staffing its National Authority. Yet another is focusing on identifying declarable industry before addressing the practical aspects of controlling scheduled chemicals. Political changes and the lack of a parliament had delayed enactment of legislation for one State.
- 3.8 One State Party traces its problems in implementation to the fact that OPCW training courses are provided in English only, and that the language barrier is preventing a good understanding of how the Convention's obligations can be effectively enforced. As a final remark, one responding State indicated that it will use the questionnaire as a comprehensive set of guidelines for drafting its regulations.

4. Preliminary conclusions and recommendations

- 4.1 It will be difficult to meet the object and purpose of the Convention's provisions on controlling scheduled chemicals and their precursors if adequate internal legislation is not in force for all States Parties to the Convention.
- 4.2 Uniform application of Convention's provisions will not be possible as long as the national implementing legislation reflects such widely divergent interpretations of declarable activities.
- 4.3 Customs unions, free trade zones and other initiatives aimed at opening up trade possibilities in today's global economy are in some cases presenting a challenge to the reporting and enforcement obligations under the Convention. States Parties which are participating in such special legal regimes may need to determine how in practice they will reconcile those obligations with their trade-related and reporting obligations under the Chemical Weapons Convention. States Parties which have succeeded in identifying solutions in this respect are invited to inform the Secretariat so that the experience can be shared with other States Parties. The Secretariat's contacts with other treaty-implementing bodies has shown that similar difficulties are occurring for some of them with trade-related obligations. Recent information indicates that one union now intends to amend its regulations in order to enable union members to track, within the union, chemicals used in the illicit manufacture of narcotics. The Secretariat will keep States Parties informed of the results in that case.
- 4.4 Bearing in mind the sovereign rights of States and their own policy considerations, in the future, States Parties may wish to contemplate a framework for national implementing legislation, and the main components of such legislation that need to be

in place as a minimum. One alternative would be for States Parties to agree on basic model legislation that could be developed by the Executive Council and approved by the Conference, as was done for facility agreements.

- 4.5 In the larger scheme, as the global marketplace grows and unifies, States Parties may find themselves looking to the integrated legislative approach as a means to fulfil their obligations to implement trade measures under a number of multilateral regimes to which they are already party. The responses to the legislation questionnaire, indicating that integration reduces the administrative burden, promotes coherency and enables more effective enforcement, may point to a trend in that direction.

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