

ARTICLES

The Advent of International Chemical Regulation: The Chemical Weapons Convention Implementation Act

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The United States ratified the Chemical Weapons Convention (CWC or Convention)¹ in April 1997 in fulfillment of its commitment to destroy its stockpiles of chemical weapons and to support international efforts to verify their continued non-production.² Eighteen months later, in the Omnibus Appropriations Act of 1998,³ Congress enacted legislation to implement the CWC: The Chemical Weapons Convention Implementation Act (CWCIA)⁴. This legislation has profound implications for vast sectors of the American chemical industry, not because those sectors have anything to do with chemical weapons, but because the CWC's verification regime is so intrusive into commercial chemical activities.

I. Introduction — The Chemical Weapons Convention

The CWC demands elimination of an entire category of weapons — a category of weapons that has been an abhorrent scourge of humankind. It unconditionally stipulates that use or possession of chemical weapons⁵ is illegal. No State Party may use chemical weapons nor engage in any military preparations for such use, nor may a State Party develop, otherwise acquire, stockpile or retain chemical weapons, transfer them or assist anyone to engage in prohibited conduct.⁶ Existing chemical weapon stockpiles and production facilities must be declared and destroyed subject to environmental, health, and safety constraints, beginning within two years and completed not later than ten years after the CWC takes effect.⁷

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1. The Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on Their Destruction, Jan. 13, 1993, 32 I.L.M. 800 (entered into force April 29, 1997) [hereinafter CWC]. As of January 1999, the CWC has over 170 signatory States, of whom over 120 are State Parties having deposited instruments of ratification. United Nations Secretary-General Boutros Boutros-Ghali, speaking at the ceremony opening the CWC for signature, stated that the CWC "must go down in history as one of the most tangible signs of the current advance towards a universal order. . . . [The CWC is] a decisive advance in the history of disarmament."

2. S. Res. 17, 105th Cong. (1997) (enacted).

3. Pub. L. No. 105-277, 112 Stat. 2681.

4. 22 U.S.C. § 5601 et. seq. (1998).

5. Chemical weapons are defined as toxic chemicals and their precursors, except where intended for not-prohibited purposes, as long as the types and quantities are consistent with such purposes; munitions and devices specifically designed to cause death or other harm through the toxic properties of toxic chemicals which would be released as a result of employment of such munitions and devices; and any equipment specifically designed for use directly in connection with the employment of munitions and devices. CWC, art. II, 1.

6. CWC, art. I, ¶ 1(b). This prohibition can abide no reservations. CWC, art. XXII.

7. CWC, art. IV, ¶ 6. The destruction of chemical weapons production facilities must begin

In the history of efforts to control weapons, the CWC is a momentous advance. Unlike the 1925 Geneva Protocol⁸ that only prohibited the first use of chemical and biological weapons, the CWC outlaws their production, possession, or deployment as well as their use under any conditions. The 1972 Biological Weapons Convention (BWC)⁹ contains prohibitions similar to those found in the CWC, but the BWC wholly lacks any means to verify compliance. The CWC, by contrast, propounds the most elaborate verification regime in international law. The 1970 Nuclear Non-Proliferation Treaty (NPT)¹⁰ adopted the verification regime of the International Atomic Energy Agency (IAEA)¹¹ which in many respects established the principles and methods of verification espoused by the CWC, but the NPT is discriminatory in that the prohibition against nuclear proliferation excepts five States who may legally retain possession of nuclear weapons. The CWC's obligations, by contrast, apply equally to all States.

A. Mechanisms of Compliance

A significant aspect of the CWC is the establishment of a new independent international body: The Organization for the Prohibition of Chemical Weapons (OPCW) that will monitor the chemical production capabilities and activities of CWC State Parties.¹² The OPCW's mission is to govern all aspects of CWC compliance and to oversee the accomplishment of the CWC's objectives. Most importantly, the OPCW will carry out the Convention's verification measures. Its principal organ, the Conference of the State Parties, supervises CWC operation, enacts procedural rules, assesses compliance, and resolves issues as to the CWC's scope. The Executive Council administers day-to-day activities, including supervising verification. Members are elected for two year terms by the Conference based on equitable geographic distribution; some seats in each region are designated for nations with the largest chemical industries.

The OPCW Technical Secretariat is the subsidiary body that will actually conduct verification activities as well as other functions delegated to it by the Conference and the Council. The Technical Secretariat consists of a Director-General appointed for a four-year term, inspectors, and requisite scientific, technical and other personnel. The Technical Secretariat receives declarations from States Parties and monitors facilities which could relate to chemical weapons production. Inspectors of the Technical Secretariat carry out the on-site inspections that make the CWC so uniquely intrusive.

If the Technical Secretariat identifies evidence of non-compliance, the Executive Council will ask the State Party to redress the problem. If the State Party fails to do so

within one year and be completed not later than ten years after the CWC takes effect. CWC, art. V, ¶ 8. Each State Party may destroy its weapons and facilities however it chooses so long as the destruction can be verified. CWC, Verification Annex, pt. IV, ¶¶ 13-14; pt. V, ¶¶ 11, 44(a).

8. Geneva Protocol for Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, June 17, 1925, 26 U.S.T. 571 (entered into force Feb. 8, 1928) [hereinafter Geneva Protocol].

9. Convention on the Prohibition of the Development, Production, and Stockpiling, of Bacteriological (Biological) and Toxin Weapons, Feb. 25, 1972, 26 U.S.T. 583 (entered into force Mar. 26, 1975) [hereinafter BWC]. The BWC has been ratified by 140 nations and signed by an additional 18.

10. Treaty on the Non-Proliferation of Nuclear Weapons, July 1, 1968, 21 U.S.T. 483 (entered into force Mar. 5, 1970) [hereinafter NPT]. The NPT has over 175 State Parties.

11. The Statute of the International Atomic Energy Agency, Oct. 26, 1956, 8 U.S.T. 1093, 276 U.N.T.S. 3 (entered into force July 29, 1957). The IAEA is not a party to the NPT, nor was it created by the NPT. Under Article III of the NPT, all non-nuclear weapons States agree to accept international safeguards under IAEA auspices.

12. See generally CWC, art. VIII.

within the specified time, the Executive Council is authorized to consult with the State Parties involved. If still unsuccessful, the Conference may restrict or suspend a State Party's rights and privileges under the CWC until it conforms to its obligations. The CWC provides for but does not specify the content of possible sanctions for violations of specific obligations, giving flexibility to the Conference to react as it deems appropriate in a specific case. However, a State Party may not be deprived of its membership. Where the State Party's action threatens the object and purpose of the Convention, collective measures may be recommended. This could include withholding from the malefactor any relevant exports of chemicals, technical equipment and scientific-technical know-how. Yet, the prerogatives of the United Nations Security Council must be respected as collective action may proceed only in conformity with international law. The Conference may bring cases of particular gravity to the United Nations, which presumably can respond in any way authorized by the United Nations Charter.¹³

B. Verifying Non-Production of Chemical Weapons

It is the CWC's verification measures that make this Convention so distinctive. The CWC seeks to verify that State Parties do not initiate or resume chemical weapons production and storage. From the perspective of commercial chemical enterprises worldwide, virtually none of whom have had anything to do with chemical weapons, these verification measures are the only directly relevant aspect of this complex accord.

The CWC propounds three "Schedules" of precursor chemicals that could be made into chemical weapons roughly corresponding to the ease of making a prohibited substance and their industrial value.¹⁴ Schedule 1 chemicals primarily include chemical weapons agents. Schedule 2 chemicals are immediate precursors of weapons agents. Schedule 3 chemicals are also weapons precursors, yet Schedule 3 chemicals have many more legitimate commercial uses. Production and use of these chemicals is, of course, completely legal if for legitimate purposes: commercial, military, or any other non-illicit activity.¹⁵ However, production or use of these same chemicals may not be for purposes that the CWC prohibits — thus the need to monitor and verify activities pertaining to these chemicals.

The CWC imposes extensive reporting obligations and inspections on thousands of facilities worldwide, and hundreds within the United States, which produce, possess, or use Scheduled chemicals. These obligations are not the consequence of the negotiators' belief that chemical companies are covertly engaged in weapons production, and it should not be inferred that the Convention insinuates suspicion of legitimate production and use of chemicals. On the contrary, with the strong support of chemical industry associations worldwide, the negotiators focused verification measures on industry because production of militarily significant quantities of lethal chemical agents requires substantial equipment and materials. If a State seeks a chemical weapons capability, it will most likely take advantage of the capabilities already existing within its industrial base.

13. See generally CWC, art. XII. See also CWC, art. VIII, ¶¶ 2, 36.

14. CWC, Annex on Chemicals.

15. CWC, art. VI, ¶ 1.

A genuinely important idea underlies the CWC: modern efforts to control weapons and prevent proliferation require regulation of industrial capabilities to verify that those capabilities are not devoted to weapons purposes. Prior to the CWC, weapons control treaties limited nations and their militaries but did not significantly and broadly affect the rights and interests of private citizens. However, due to changes in weapons and delivery systems, control treaties must focus on their production as well as their deployment. Because of their focus on weapons production, control treaties must regulate private commercial activity that could be used to produce those weapons. Since privately-owned entities are regulated, the legal issues surrounding treaty implementation are immensely more complicated.¹⁶

1. *Declarations*

Each State Party must make initial and annual declarations regarding any facility that produces, acquires, consumes, uses or stores a scheduled chemical above specified thresholds. The information to be declared varies with the Schedule triggering the declaration. More detailed information must be provided about Schedule 1 chemicals and related facilities than about Schedule 2 chemicals and even less about Schedule 3 chemicals. For example, declarations regarding Schedule 1 chemicals and related facilities include considerable detailed information about the chemicals and related facilities, while declarations regarding Schedule 2 and Schedule 3 chemicals and related facilities focus on aggregate national data, on plant sites, and on past production of these chemicals that were used for chemical weapons purposes. Similarly, declarations of Schedule 2 chemicals and related facilities must include the quantities of Schedule 2 chemicals produced or consumed at each plant site, whereas Schedule 3 declarations only require identification of plant sites that produce these chemicals. In addition, some declaration requirements apply with regard to facilities that produce by synthesis unscheduled discrete organic chemicals containing the elements phosphorous, sulfur, or fluorine over threshold quantities.

The OPCW Director-General must establish a stringent regime governing the handling of declared information including agreements and regulations specifying what information State Parties must provide.¹⁷ Confidential information will be securely stored at the OPCW in a way that precludes the identification of the facility to which the information pertains, and that information will be disseminated within the OPCW on a need-to-know basis and will not published or released.¹⁸ The Director-General

16. See generally, David S. Gualtieri, Barry Kellman, E. Apt, & Edward A. Tanzman, *Advancing The Law of Weapons Control — Comparative Approaches to Strengthen Nuclear Non-Proliferation*, 16 MICH. J. INT'L L. 1029, 1108 (1995).

17. The CWC denotes information as confidential: 1) if the State Party so designates, or 2) if, in the judgement of the Director-General, the unauthorized disclosure of the information could cause damage to the State Party to which it refers (including private interests that the State Party represents) or to the mechanisms implementing the CWC. The level of sensitivity of confidential data is to be established based upon criteria categorized in a classification system that must be applied uniformly. CWC, Confidentiality Annex, ¶¶ 1-2.

18. *Id.* ¶ 2. Such documents include: initial and annual reports and declarations, general reports on verification activities and other information provided in compliance with the CWC. *Id.* (A)(2)(b)(i)-(iii). The exceptions are: 1) general information on CWC implementation; 2) information released with the express consent of the State Party to which the information refers; and 3) confidential information released by the OPCW pursuant to agreed procedures which ensure that release only occurs in strict conformity with the needs of the CWC. *Id.* (A)(2)(c)(i)-(iii).

must also establish procedures to follow in the event of a breach or alleged breach of confidentiality.¹⁹ If staff members breach confidentiality, the Director-General must impose appropriate punishment or discipline. In serious cases, the Director-General may waive the immunity from prosecution that the Convention confers on OPCW employees, but the OPCW cannot be held liable for any breach of confidentiality committed by its members.

2. *Inspections*

The CWC provides for two types of on-site inspections. Routine inspections apply to facilities that a State Party has declared to possess, consume, or store significant quantities of Scheduled chemicals. "Challenge" inspections are the mechanism to determine whether doubts about a State Party's compliance are justified. These inspections can happen anywhere and may not be refused by the inspected State. Unlike routine inspections, these inspections would not occur on a regular basis and would insinuate suspicions of non-compliance.

In regard to all inspections, the OPCW will require only the minimum amount of information necessary to carry out its responsibilities. Each State Party may take measures it deems necessary to protect confidentiality so long as it fulfills its obligations to demonstrate compliance. During inspections (both routine and challenge), a State Party may indicate to the inspection team sensitive equipment, documentation, or areas that are unrelated to the inspection's purpose.²⁰ Moreover, the inspection team must fully respect procedures designed to protect sensitive installations and to prevent the disclosure of confidential data. The inspection report must contain only facts relevant to the CWC and must be handled just as any other CWC confidential information. The Director-General, inspectors, and other staff members must not disclose any confidential information that they have acquired in the course of their duties.²¹

a. *Routine Inspections*

The Technical Secretariat will conduct routine inspections of chemical facilities to verify the accuracy of declared information and compliance with CWC obligations. These inspections are limited as to purpose and scope as well as to which facilities would be inspected and what they might imply about compliance. Routine inspections are not conducted pursuant to a suspicion of a treaty violation; they imply nothing whatsoever about compliance. The number, intensity, and duration of these inspections vary according to the risk to the objectives of the CWC posed by the chemicals at the facility, its characteristics, and the activities carried out there. The CWC stipulates how facilities with declared chemicals will be selected for inspection, procedures for notifi-

19. If the Director-General believes that the obligation to protect confidential information has been violated or if there has been an allegation to this effect, he or she may investigate. State Parties must cooperate in any such investigation. If a breach is established, a State Party must take "appropriate action." *Id.* ¶¶ 18-21. It is an open question as to what "appropriate action" might entail. The procedures to be followed in the event of a breach or an alleged breach of confidentiality and, presumably, the resulting responsibilities of the State Parties are to be developed by the Director-General and approved by the Conference of State Parties.

20. *Id.* ¶ 13.

21. *Id.* ¶¶ 6-7. This obligation continues even after the end of their functions. Also, staff members must sign individual secrecy agreements with the Technical Secretariat covering the period of their employment and five years thereafter. *Id.* ¶ 9.

cation, entry into the inspected State Party, and conduct of inspections. Agents of the host State Party may accompany inspectors to ensure that the limits of authority are not exceeded. Moreover, the CWC provides for "facility agreements" which specify the time, place, and manner of verification activities.

The inspected State Party must ensure the inspection team's safe conduct to the inspection site within 12 hours from its arrival at the point of entry.²² Inspectors must have unimpeded access to the inspection site and may choose the items to be inspected. Most inspections will be of Schedule 2 facilities that will be covered by facility agreements negotiated between the State Party and the OPCW.²³ As a rule, access will include elements of the common infrastructure of the plant site directly associated with the declared activities related to the Scheduled chemicals.²⁴ While the inspection team must timely and effectively discharge its functions, inspections should cause the least possible inconvenience or disturbance to the State Party and the inspected facility. Moreover, the inspection team must not operate the facility, must avoid unnecessary interference or delay of its operation, and must avoid affecting its safety.²⁵

Inspectors may interview any facility personnel in the presence of the inspected State Party's representatives to establish necessary facts. The inspection team may inspect documents and records that they deem relevant to the conduct of their mission. Inspectors can also demand that representatives of the inspected State Party or the inspected facility take photographs.²⁶ If the inspection team requests access to other parts of the facility not covered by the facility agreement, access to these areas must be granted according to a clarification procedure which obligates the inspected State Party to provide the inspection team with enough information to clarify the ambiguity,²⁷ including providing access to areas of declared facilities that raise ambigu-

22. CWC Verification Annex, pt. II, ¶¶ 22-25, 35-36.

23. The OPCW has elaborated model facility agreements for each type of declared facility, and Section 7 of those model agreements covers the conduct of inspections. A generic model facility agreement covers all declared facilities. Separate model provisions have been drafted for various sections of the facility agreements. See OPCW Report, "Generic Text Elements for Model Facility Agreements" and OPCW Report, "Discussion Paper Prepared by the Secretariat: Facility-Specific Sections of the Model Facility Agreement".

24. The areas to be inspected may include: (1) areas where feed chemicals (reactants) are delivered or stored; (2) areas where manipulative processes are performed upon the reactants prior to addition to the reaction vessels; (3) feed lines as appropriate from the areas referred to in subparagraph (a) or subparagraph (b) to the reaction vessels together with any associated valves, flow meters, etc.; (4) the external aspect of the reaction vessels and ancillary equipment; (5) lines from the reaction vessels leading to long or short-term storage or to equipment further processing the declared Schedule 2 chemicals; (6) control equipment associated with any of the items under subparagraphs (a) to (e); (7) equipment and areas for waste and effluent handling; (8) equipment and areas for disposition of chemicals not up to specification. CWC Verification Annex, pt. VII, ¶ 28.

25. *Id.* Verification Annex, pt. II, ¶¶ 38-41, 45. Taking into account the guidelines developed and approved by the Conference of State Parties, the Technical Secretariat must develop detailed procedures to conduct inspections for inclusion in the inspection manual. *Id.* Verification Annex, pt. II, ¶ 42. If the inspection team considers it necessary, it may request the facility's designated representative to carry out a particular operation. *Id.* Verification Annex, pt. II, ¶ 40. See also art. VI, ¶ 10.

26. *Id.* Verification Annex, pt. II, ¶¶ 47, 48. The inspected State Party must make available the capability to take instant development photographic prints. The inspection team will determine if photographs conform to their request and, if not, the inspected State Party may be required to take repeat photographs. *Id.*

27. *Id.* Verification Annex, pt. VII, ¶ 25 explicitly invokes pt. II, ¶ 51 which provides that if ambiguities regarding an object or building within the inspection site are not resolved, the object or building can be photographed in order to clarify its purpose or function. Issues that cannot be resolved will be brought to the attention of the Technical Secretariat, and the ambiguity will be noted in the

ities.²⁸ Moreover, all CWC State Parties must cooperate with the Organization in the exercise of all its functions and in particular to provide assistance to the Technical Secretariat.

b. Challenge Inspections

If a State Party has doubts as to another State Party's compliance, it may request a challenge inspection, conducted by an inspection team designated by the Director-General, of any location in the territory or under the jurisdiction or control of a State Party.²⁹ The challenge inspection may be stopped only if three-quarters of the Executive Council deem the request frivolous (the concerns are minor irregularities or excessively technical), abusive (the concerns are artificial or intended to harass), or clearly beyond the scope of the CWC challenge inspection provisions.³⁰ The requested State Party may not refuse the inspection.

While challenge inspections are relatively unconstrained, inspectors may only seek relevant facts to clarify the non-compliance concerns. The inspection should be conducted in the least intrusive manner possible, proceeding to more intrusive methods only as necessary.³¹ The inspected State Party must make every reasonable effort to demonstrate its compliance with the CWC. Access must be granted to the greatest degree "taking into account any constitutional obligations [the State Party] may have with regard to proprietary rights or searches and seizures."³² The inspection team and the inspected State Party will negotiate the extent of access, the performance of activities, and the provision of information.³³ The inspection must be completed within eighty four hours unless the inspected State Party agrees to an extension.³⁴

The inspection team must prepare a report summarizing its activities and findings as to the compliance concerns that prompted the request and, within thirty days, circulate that report to the requesting State Party, the Executive Council, and the inspected State Party. The Executive Council will determine if any non-compliance has occurred

final inspection report.

28. CWC, art. VIII, ¶ 37.

29. CWC, *supra* note 1, art. IX, ¶ 8. State Parties may first engage in direct consultation and cooperation. If requested, a State Party must, within ten days, provide information to satisfy another State Party's concerns. In addition, a State Party may ask the Executive Council to request clarification from another State Party or have the Director-General establish a group of experts. If doubts remain, a State Party may request a special session of the Executive Council or, after 60 days, a special session of the Conference of State Parties to resolve the situation. Any such efforts to resolve doubts do not affect the requesting State Party's rights and obligations, including the right to request a challenge inspection. *Id.* art. IX, ¶¶ 2-7.

30. *Id.* art. IX, ¶ 17. See also WALTER KRUTZSCH & RALF TRAPP, A COMMENTARY ON THE CHEMICAL WEAPONS CONVENTION 189-191 (1994).

31. CWC, *supra* note 1, Verification Annex, pt. X, ¶¶ 44-45.

32. Those limitations may not be invoked to conceal evasion of CWC obligations nor to engage in prohibited activities; if invoked, the inspected State Party must provide reasonable alternative means to clarify the possible non-compliance concern that generated the challenge inspection. *Id.* pt. X, ¶ 41.

33. For declared facilities with facility agreements, access must be unimpeded within the agreed boundaries. For declared facilities without facility agreements, access will be negotiated according to the CWC's general inspection guidelines. *Id.* pt. X, ¶ 51. Regardless of negotiated limitations, if the inspection team finds evidence of non-compliance, it will not be bound to the managed access agreement. *Id.* pt. X, ¶ 47. See also KRUTZSCH, *supra* note 30, at 491.

34. Upon completion of the inspection, the inspection team and the observer must leave the inspected State Party's territory in the minimum time possible. CWC, *supra* note 1, Verification Annex, pt. X, ¶¶ 57-58.

and may take further appropriate actions to ensure CWC compliance or may make specific recommendations to the Conference.³⁵

C. Restrictions on International Trade of Chemicals

Transfers of Scheduled chemicals among States Parties must be for CWC-allowable purposes. Schedule 1 chemicals are subject to the most severe transfer restrictions. A State Party cannot produce, acquire, retain or use Schedule 1 chemicals outside the territories of State Parties.³⁶ These chemicals may be transferred only to another CWC State Party and only for research, medical, pharmaceutical, or protective purposes; they may not be retransferred. Both the transferring and receiving State Parties must notify the Technical Secretariat of each transfer of Scheduled chemicals not less than thirty days before any transfer. Furthermore, each State Party must make annual declarations regarding transfers during the previous year. For each Schedule 1 chemical that has been transferred, the declaration must identify the chemical and specify the quantity, recipient, and the purpose.³⁷

Chemicals listed on Schedule 2 may be transferred only to or received from State Parties. This restriction will take effect three years after the CWC enters into force. During the interim, each State Party must require an end-use certificate for transfers of these chemicals to States not Party to the CWC.³⁸ Export restrictions of precursor chemicals listed on Schedule 3 apply only to transfers made to States not Party to the CWC. For these transfers, each State Party must adopt measures to ensure that the transferred chemicals are only used for purposes not prohibited under the CWC³⁹ and obtain a certificate to this effect from the receiving State. States Parties must also "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."⁴⁰

D. Enactment of Implementing Legislation

International treaties can bind only States, not natural or legal persons. The CWC propounds obligations on consenting States, but measures to compel reporting of industrial information or acceptance of inspections can only be legally effective, at least in legal systems including and similar to the United States,⁴¹ through enactment of domestic legislation whereby the government, in compliance with its treaty obligations, extends those obligations to entities within its jurisdiction. Recognizing this condition, the negotiators included within the CWC itself a requirement that each State Party enact implementing legislation which enables OPCW personnel to carry out their required functions within that State Party, authorizes domestic officials to coordinate their activities to make compliance efficient, and requires citizens to perform treaty-

35. *Id.* art. IX, ¶¶ 22-25.

36. *Id.* Verification Annex, pt. VI, ¶ 1.

37. *Id.* Verification Annex, pt. VI, ¶¶ 3-12.

38. *Id.* Verification Annex, pt. VII, ¶¶ 31-32.

39. CWC, *supra* note 1, Verification Annex, pt. VIII, ¶ 26.

40. *Id.* art. XI, ¶ 2(e). It should be noted that since 1985 the "Australia Group" has played an important role in coordinating export controls on 54 chemicals and dual-use equipment important to the development and spread of chemical weapons. Since the CWC's conclusion, the 26 members of the Australia Group have agreed to review controls on exports to signatory states.

41. The United States adheres to the doctrine of dualism with regard to implementation of international obligations. Accordingly, a treaty is not a part of domestic law and has no effect on private parties in the United States until enactment of domestic legislation.

specified obligations. The CWC goes beyond all prior weapons control treaties in this regard.

The remainder of this discussion focuses on implementation of the Chemical Weapons Convention in the United States, a process that has now culminated in the CWCIA.⁴² Obviously, under United States law, private chemical companies could not be required to report information nor to host inspections without legislation in force prescribing such obligations. Just as obviously, that legislation could not contravene anyone's constitutional rights, including the rights of chemical enterprises, to be protected from illegal search and seizure and from illegal takings of property.⁴³ Thus, enactment of legislation that balanced CWC compliance with constitutionally protected interests was absolutely necessary for the United States to satisfy its international commitments.

II. The Chemical Weapons Convention Implementation Act

This discussion examines six aspects of the CWCIA with primary focus on its implications for the commercial chemical industry: (A) Establishment of a national administrative authority; (B) Restrictions on the production of "Schedule 1" chemicals; (C) Collection of information for declarations; (D) Authorization for the conduct of OPCW inspections; (E) Enactment of penal measures, and (F) Remedies for and sanctions against property losses.

A. Establishment of a National Administrative Authority

According to the Convention, each State Party must designate or establish a National Authority to serve as the national focal point for effective liaison with the OPCW and other State Parties. The phrasing of this obligation is notable in two respects. First, the Convention says nothing about the National Authority's location or composition. It is entirely up to each State Party to decide whether the National Authority should be a newly-established agency, an already-existing agency, or a composite of numerous agencies. Moreover, the National Authority may be located in any Executive Branch department such as: foreign affairs, defense, commerce, or interior.

The second notable aspect here is that, while the Convention imposes literally hundreds of obligations on each State Party, only a meager handful of these obligations must be performed by the National Authority. Virtually all CWC obligations, except for the liaison function, could be carried out by an administrative agency other than the National Authority. While most State Parties have chosen to centralize many core CWC functions within the National Authority, specific tasks notably within the province of an existing agency (*e.g.* in almost every State, the Ministry of Foreign Affairs — the U.S. State Department — is responsible for issuing visas) are assigned to that agency even if it is not the National Authority.

That State Parties could delegate many CWC functions to parts of their governments other than the National Authority was realized only after the final draft of the Convention was signed in 1993 as States increasingly became aware that the CWC's manifold obligations intruded into various entrenched governmental domains. To cope

42. Chemical Weapons Convention Implementation Act, *supra* note 1.

43. See Edward A. Tanzman & Barry Kellman, *Legal Implementation of the Multilateral Chemical Weapons Convention: Integrating International Security with the Constitution*, 22 N.Y.U. INT'L. L. & POL. 475, 477, 497-500 (1990).

with such complexities, some State Parties designated as their National Authority a working group made of representatives of other agencies.

The United States National Authority is certainly one of the most complex designations of CWC responsibility of any State Party. The Department of Commerce is the National Authority (the Secretary of State is the Director of the National Authority) with responsibility to serve as a liaison *and* to implement all other obligations in coordination with an Interagency Group consisting of the Secretary of Commerce, Secretary of Defense, Secretary of Energy, the Attorney General, as well as other agency heads. In this way, communication with the OPCW and other State Parties as well as general implementation responsibilities are centralized with the Department of State while existing substantive responsibility over specific CWC functions can be retained by other Departments so long as overall coordination is achieved through an interagency process.

The Interagency Group is expected to have five primary functions: 1) provide policy guidance/decisions, (2) establish procedures to coordinate CWC routine and challenge inspections, (3) ensure appropriate U.S. government representation during CWC inspections, (4) advise on treaty obligations and ambiguities about compliance, and (5) decide on appropriate action if OPCW inspectors and U.S. officials disagree. Its function of providing policy guidance/decisions applies to: CWC implementation issues, requests from other States Parties for information or assistance, and U.S. requests for challenge inspections as well as other States Parties' requests for challenge inspections not against the U.S.

B. Restrictions on Production of Schedule 1 Chemicals

The lethal Schedule 1 chemicals that present the greatest risk to the CWC's object and purpose may be produced only in limited quantities at specific types of facilities. State Parties may produce Schedule 1 chemicals at only two types of facilities: at a single "small-scale" facility "approved by the State Party" and at "other facilities" that produce only a limited quantity of Schedule 1 chemicals and for only limited purposes. "Production of Schedule 1 chemicals in aggregate quantities not exceeding 10 kg per year may be carried out for protective purposes at one facility outside a single small-scale facility."⁴⁴ In addition, at facilities approved by the State Party, "[p]roduction of Schedule 1 chemicals in quantities of more than 100 g per year may be carried out for research, medical, or pharmaceutical purposes outside a single small scale facility in aggregate quantities not exceeding 10 kg per year per facility." Finally, "[s]ynthesis of Schedule 1 chemicals for research, medical, or pharmaceutical purposes, but not for protective purposes, may be carried out at laboratories in aggregate quantities less than 100 g per year per facility."⁴⁵

Virtually every State Party with a potential to produce Schedule 1 chemicals has enacted some type of licensing system whereby production by any person would be

44. CWC, *supra* note 1, Verification Annex, pt. VI, (C)(8), (10). Protective purposes are "those purposes directly related to protection against toxic chemicals and to protection against chemical weapons." *Id.* Art. II, ¶ 9(b).

45. *Id.* Verification Annex, pt. VI, (C)(11)-(12). "Each State Party, during production . . . shall assign the highest priority to ensuring the safety of people and to protecting the environment." Further, "[e]ach State Party shall conduct such production in accordance with its national standards for safety and emissions." *Id.* Verification Annex, pt. VI(7).

prohibited except with a permit or license which would enable the government to ensure that CWC ceilings are, in fact, respected. Some State Parties have established elaborate permit systems that specify the requirements for a permit, application procedures, variances, renewals, permit conditions, and revocations. The measures to implement these permit systems include CWC definitions of a facility using, producing, or transferring Schedule 1 chemicals so that treaty-limited endeavors may not legally escape regulation.

Curiously, the CWCIA does not include any type of licensing system for the production of Schedule 1 chemicals. Indeed, the legislation includes no restrictions whatsoever on production of such chemicals. This is one of the biggest holes in the CWCIA, and it remains to be seen how the United States will ensure that CWC limits are not exceeded. The Department of Commerce, which is responsible for drafting regulations that elucidate the CWCIA, may promulgate a licensing system.

C. Collection of Information for Declarations

As discussed above, each State Party must submit detailed declarations to the OPCW concerning relevant chemical activities within its jurisdiction. To fulfill this requirement, each State Party must: (1) gather and organize information within the government's possession, either because the relevant chemical activities are government-owned or, though privately owned, the government has obtained that information under other regulatory obligations (*e.g.* environmental or workplace safety laws); and (2) obligate private entities to report to the government any relevant information in their possession.

The CWCIA contains some definitions and provisions that are relevant to determining who must report their activities to the government. As to technical terms, the CWCIA simply re-states the CWC's definitions of "a chemical weapon,"⁴⁶ "a key component of a binary or multicomponent chemical system,"⁴⁷ a "precursor" chemical,⁴⁸ a Schedule 1, 2, or 3 chemical agent,⁴⁹ "a toxic chemical,"⁵⁰ "an unscheduled discrete organic chemical,"⁵¹ and "purposes not prohibited."⁵² Somewhat more signif-

46. A chemical weapon is: "(A) a toxic chemical and its precursors, except where intended for a purpose not prohibited . . . as long as the type and quantity is consistent with such a purpose; (B) a munition or device, specifically designed to cause death or other harm through toxic properties . . . which would be released as a result of the employment of such munition or device; or (C) any equipment specifically designed for use directly in connection with the employment of munitions or devices . . ." *Id.* art. II, ¶ 1(a)-(c).

47. "The term 'key component of a binary or multicomponent chemical system' means the precursor which plays the most important role in determining the toxic properties of the final product and reacts rapidly with other chemicals in the binary or multicomponent system." Chemical Weapons Convention Implementation Act of 1998, Pub. L. No. 105-277, 112 Stat. 2681, 2856, § 3(3).

48. "The term 'precursor' means any chemical reactant which takes part at any stage in the production by whatever method of a toxic chemical. The term includes any key component of a binary or multicomponent chemical system." *Id.* § 3(7)(A).

49. The CWC's Schedules of Chemicals may be found in the Annex on Chemicals. *Id.* § 3(10)-(12).

50. "The term 'toxic chemical' means any chemical which through its chemical action on life processes can cause death, temporary incapacitation or permanent harm to humans or animals. The term includes all such chemicals, regardless of their origin or of their method of production, and regardless of whether they are produced in facilities, in munitions or elsewhere." *Id.* § 3(13)(A).

51. "The term 'unscheduled discrete organic chemical' means any chemical not listed on any schedule contained in the Annex on Chemicals of the Convention that belongs to the class of chemical compounds consisting of all compounds of carbon, except for its oxides, sulfides, and metal carbon-

icant is that the CWCIA specifically excludes from reporting requirements any substance having low concentrations of Schedule 2⁵³ or 3⁵⁴ chemicals as measured on the basis of volume or total weight whichever measurement yields the lesser percent.

The CWCIA authorizes the National Authority (in this context, the Department of State) to ensure that each person to whom CWC declaration requirements apply be obligated to: (1) maintain and permit access to relevant records, and (2) submit to the Director of the National Authority (the Secretary of State) such reports as necessary to enable the National Authority to provide "the minimum amount of information and data necessary for the timely and efficient conduct by the OPCW of its responsibilities under the Convention." To the extent feasible, no report must be submitted that is unnecessary or duplicative of any report required by any other law, and each federal agency must coordinate with other agencies in order to avoid the imposition of duplicative reporting requirements.

Willful failure or refusal to establish or maintain any required record or to submit information to the government or to permit access to any record is illegal. Violators may be required to pay a civil penalty up to \$5,000 for each violation.⁵⁵ Anyone knowingly violating these requirements shall in addition to or in lieu of the civil penalty also be criminally fined or imprisoned up to one year, or both.⁵⁶

With large quantities of confidential business information (CBI) reported to the government, a potential problem could arise if that CBI becomes publicly available. Protection of CBI is critical to chemical industry participants; its revelation can enable a competitor to obtain, at minimal cost, information that its originator acquired through an enormous investment of time and money, thereby erasing the competitive advantage created by that initial investment in research and development. Since the cooperation of chemical firms is essential to the success of the CWC, widespread concern over the loss of CBI could potentially impede CWC implementation.⁵⁷ Accordingly, the CWCIA provides that any government officer or employee (or employee of the OPCW Technical Secretariat) who willfully discloses information known to be confidential shall be fined or imprisoned for up to five years or both, and his or her property is subject to forfeiture.⁵⁸

ates." *Id.* § 3(15).

52. "The term 'purposes not prohibited by this Act' means the following: (A) PEACEFUL PURPOSES — Any peaceful purpose related to an industrial, agricultural, research, medical, or pharmaceutical activity or other activity. (B) PROTECTIVE PURPOSES — Any purpose directly related to protection against toxic chemicals and to protection against chemical weapons. (C) UNRELATED MILITARY PURPOSES — Any military purposes of the United States that is not connected with the use of a chemical weapon and that is not dependent on the use of toxic or poisonous properties of the chemical weapon to cause death or other harm. (D) LAW ENFORCEMENT PURPOSES — Any law enforcement purpose, including any domestic riot control purpose. Notably, subsection (D) adds to the CWC definition of law enforcement purposes: "imposition of capital punishment." *Id.* § 3(8).

53. Low concentration of Schedule 2 chemicals is defined as less than a 10% concentration. *Id.* § 402(a)(1).

54. Low concentration of Schedule 3 chemicals is defined as less than an 80% concentration. *Id.* § 402(a)(1).

55. *Id.* § 501(a)(1)(B).

56. *Id.* § 501(a)(6)(B).

57. See generally Barry Kellman, David S. Gualtieri, & Edward A. Tanzman, *Disarmament and Disclosure: How Arms Control Verification Can Proceed Without Threatening Confidential Business Information*, 36 HARV. INT'L. L.J. 71 (1995).

58. CWCIA, *supra* note 47, § 404 (a)(D)-(F).

The risk of CBI loss is heightened by the possibility that a competitor could obtain reported CBI by filing a request under the Freedom of Information Act (FOIA).⁵⁹ Under FOIA, information reported to the government must be disclosed upon request unless that information comes within one of the Act's exceptions. Under Exemption 3, agencies are not requested to disclose information pertaining to "matters that are specifically exempted from disclosure by statute"⁶⁰ Accordingly, the CWCIA exempts any reported CBI from FOIA disclosure except to the OPCW, Congress, or to other Federal agencies for law enforcement purposes.⁶¹ Reported information may be disclosed in the national interest, but only if notice of intent to disclose the information is provided to the submitter or the person to whom it pertains. If the person objects, the agency must afford the person a hearing in order to present the objections to the disclosure; the agency must review the grounds for the objection and notify the submitter whether the disclosure will occur notwithstanding the objections.⁶²

D. Inspections

By far, the most unique and far-reaching aspect of the CWC is its requirement for intrusive on-site inspections. Many verification inspections uniquely focus on facilities that are privately owned, thereby introducing an additional level of government intrusion into private commercial activity which could impinge on rights of privacy. Yet, the CWC does not recognize any limitation on the OPCW's authority to conduct routine inspections, and challenge inspections are limited only if their conduct would contravene constitutional protections concerning search and seizure. Despite this, the CWCIA extends to the President the authority to deny a request to inspect any facility in the United States if the President determines that the inspection may pose a threat to the national security interests of the United States.⁶³

Initially, it was United States officials who proposed that a treaty to ban chemical weapons should contain powerful verification measures, including "anywhere, anytime" inspections. The advocates of these proposals were either unaware of their constitutional implications or were confident that other States, notably the Soviet Union, would never accept these proposals. But in international negotiations, as in other matters, there is some truth to the maxim, "Be careful of what you wish for." In 1987, Soviet Chairman Gorbachev accepted the principle of intrusive on-site inspections to verify that no State would breach its obligations under the still-being-negotiated treaty.⁶⁴ At that point, the negotiations that had foundered for over a decade were energized, and the prospects of reaching agreement rose appreciably.

In the United States, little attention was paid to the negotiations in Geneva, outside of the State Department and the Pentagon. Certainly, there is no record of any United States official expressing any concerns about the constitutionality of demanding information from and inspections of private chemical facilities and, perhaps, other sites as well. Indeed, senior Pentagon officials had adopted the position that the obligations

59. 5 U.S.C. § 552 (1994).

60. 5 U.S.C. § 552(b)(3) (1994).

61. CWCIA, *supra* note 47, § 404(A)-(B).

62. *Id.* § 404(c).

63. *Id.* § 307.

64. See Tanzman & Kellman, *supra* note 43, at 479-80.

of the United States pursuant to an international treaty were beyond the reach of the Fourth and Fifth Amendments,⁶⁵ and thus there was no need to focus on how the draft CWC text might implicate those protections.

With the growing sense that the Geneva negotiations might actually succeed in drafting and reaching agreement on a treaty, some commentators began to raise questions about this treaty's implications.⁶⁶ These inquiries focused primarily on two sets of issues. First, how might CWC inspectors lawfully gain access to a site without the consent of the site's owner or operator? If a search warrant is to be obtained, what are the standards for that warrant, especially in view of the difficulty of establishing probable cause for a search. How might the government fully ensure that the application for a warrant be granted, and how would the warrant precisely harmonize the CWC's requirements with constitutional limits on the government's authority to conduct a search? Second, how might losses of property, especially confidential business information, in connection with CWC inspections be minimized? If property is lost, either through misappropriation or through a lawful taking, either by OPCW inspectors or U.S. government personnel, what remedies may be available to the property owner?

These issues pervaded the negotiations over the final CWC text as well as the Senate debate over ratification.⁶⁷ To an extraordinary extent, the limitations on inspections included within the CWC text and the CWCIA's extensive provisions governing inspections, penalizing wrongful conduct, and establishing remedies for losses all respond to the understanding that the CWC poses uniquely demanding considerations with regard to civil liberties and protection of due process of law. To explain how these considerations have been addressed, the remainder of this section examines: (1) facility agreements, (2) participants in inspections, (3) rights of access with warrants, and (4) conduct of inspections. The following two sections discuss respectively the penal sanctions for wrongful conduct and the remedies available to property owners who suffer losses.

1. Facility Agreements

The concept of facility agreements derives from the practice of the International Atomic Energy Agency of negotiating safeguard agreements which specify the scope and conduct of inspections.⁶⁸ Facility agreements, therefore, include detailed and specific arrangements regarding the scope of access and matters pertaining to confidentiality. The CWC provides that facility agreements will be negotiated only with respect to certain facilities, and those negotiations will be between the OPCW and each State Party. The CWCIA significantly expands the role of facility agreements in both respects.

65. See Burrus M. Carnahan, *Chemical Arms Control, Trade Secrets, and the Constitution: Facing the Unresolved Issues*, 25 INT'L. LAW. 167 (1991).

66. David A. Koplow, *Arms Control Inspection: Constitutional Restrictions on Treaty Verification in the United States*, 63 N.Y.U. L. REV. 229 (1988); and Edward A. Tanzman, *Constitutionality of Warrantless On-Site Arms Control Inspections in the United States*, 13 YALE J. INT'L. L. 21 (1988).

67. *Hearing on the Constitutionality of the Chemical Weapons Convention Before the Subcomm. on Constitution, Federalism, and Property Rights of the Senate Judiciary Comm.*, 104th Cong. (1996).

68. As the CWC final text was in preparation, IAEA national safeguards agreements were negotiated on the basis of the NPT model safeguards agreements contained in *The Structure and Content of Agreements Between the Agency and States Required in Connection with the Treaty on the Non-Proliferation of Nuclear Weapons*, IAEA Doc. INFCIRC/153 (May 1971).

The CWC provides that facility agreements be negotiated for each facility having Schedule 1 chemicals. For each facility having Schedule 2 chemicals, a facility agreement shall be negotiated unless the State Party agrees that it is unnecessary. For facilities having Schedule 3 or "other" discrete organic chemicals, there shall be no facility agreements unless the State Party so requests. Under the expanded concept of facility agreements in the CWCIA, the National Authority will ensure conclusion of a facility agreement for each Schedule 2 facility unless the facility owner, operator, occupant, or agent in charge agrees that it is unnecessary. In other words, instead of the U.S. government having to concur that an agreement is unnecessary, the control over the decision to prepare an agreement is shifted from exclusive governmental authority to the private persons responsible for the facility. Similarly with regard to facilities having Schedule 3 or "other" discrete chemicals, a facility agreement shall be concluded if the owner, operator, occupant, or agent in charge so requests.⁶⁹

The CWC does not provide that the facility owner or operator be involved in these negotiations or in the drafting of a facility agreement. Moreover, the CWC does not specify the content of facility agreements, although the OPCW has promulgated a model facility agreement. As provided by the CWCIA, prior to the development of any facility agreement, the National Authority will notify the owner, operator, occupant, or agent in charge. That person may participate in the preparations for the negotiation of the agreement and may observe the negotiations of the agreement between the United States and the OPCW.⁷⁰ Moreover, the CWCIA provides that facility agreements shall identify what is and what is not subject to inspection (areas, equipment, computers, records, data, and samples), the procedures for providing notice of an inspection, and the timeframes for inspections.⁷¹

In addition, it is noteworthy that the CWCIA provides that an owner of a private facility may request assistance from the Secretary of Defense to prepare for inspections. The beneficiary of such assistance must reimburse the Secretary for costs unless the beneficiary is a small business or a producer of Schedule 3 or "other" discrete organic chemicals.⁷²

2. *Participants in Inspections*

CWC inspections will be conducted by inspectors displaying appropriate identifying credentials⁷³ who are designated by the OPCW according to a complex system of approval by States Parties. The CWCIA modifies this system only by providing that the President, who has the authority to object to inspector nominees, should object to any member or participant in any terrorist group, anyone who has committed a felony under U.S. law, or anyone who poses a risk to U.S. national security or economic well-being.⁷⁴

In addition to OPCW inspectors, the CWC provides that the host State Party have its representatives accompany the inspection team. This provision raises potential legal problems if State Party representatives accompanying the inspection team into a

69. CWCIA, *supra* note 47, § 302(b).

70. *Id.* § 302(c).

71. *Id.* § 302(d).

72. *Id.* § 310(c).

73. *Id.* § 304(c).

74. *Id.* § 303(b)(3).

facility gain access to areas that would be off-limits to them under other domestic laws. These representatives could use this access as an opportunity to search for evidence of domestic law violations unrelated to the CWC (*e.g.* violations of environmental or workplace safety laws). If U.S. representatives discover such evidence, they would be obligated to turn that information over to law enforcement authorities to initiate a penal investigation. Knowing this, persons whose facilities are subject to CWC inspection might resist an inspection even if they are in compliance with the CWC. In an unlikely worst case scenario, a court might be induced to block the inspection.⁷⁵

The CWCIA deals with this potential problem in a curious way. Employees of the Environmental Protection Agency or the Occupational Safety and Health Administration are strictly prohibited from accompanying any inspection team visit. This prohibition should help alleviate fears that CWC inspections will lead to discovery of legal violations within the scope of those agencies' jurisdiction. Yet, the CWCIA requires, uniquely among all State Parties, that an FBI special agent accompany each inspection team.⁷⁶ With this requirement, the CWCIA suggests that the U.S. government will overtly use OPCW inspections to discover felonies, most likely relevant to the chemical weapons prohibitions set forth in this Act (see below).

3. Access to Privately-Owned Facilities — Warrants

A CWC inspection is a government search within the meaning of the Fourth Amendment and therefore may not legally proceed without either the consent of the facility owner or a warrant. The U.S. government will seek the consent of the owner or operator, occupant or agent in charge; this consent may be withheld for any reason. Although in other regulatory contexts, consent for a search may be compelled as a condition for doing business with the government, the CWCIA specifically prohibits requiring a contractor to waive any constitutional right.⁷⁷ Thus, if specific consent is not given, the government will seek a warrant from a magistrate in an *ex parte* proceeding. It is unlawful for anyone to willfully fail or refuse to permit entry or to disrupt, delay, or otherwise impede a legally authorized inspection.⁷⁸ Any such violator will incur a civil penalty up to \$25,000 for each violation (each day constitutes a separate violation).⁷⁹ A knowing violation shall, in addition, lead to criminal penalties including fines and imprisonment up to one year.⁸⁰

a. Administrative Warrants for Routine Inspections

For a routine inspection where consent is withheld, an administrative search warrant will be obtained from a judge. Administrative searches whereby agencies inspect private property to acquire information necessary to law enforcement responsibilities are a typical feature of regulatory law, well-recognized under Fourth Amendment jurisprudence. To establish probable cause for a warrant to conduct an adminis-

75. See Tanzman & Kellman, *supra* note 43.

76. CWCIA, *supra* note 47, § 303(b)(2)(A).

77. *Id.* § 308 (amending the Office of Federal Procurement Policy Act, Pub. L. No. 93-400, 88 Stat. 796, codified at 41 U.S.C. §§ 401-430).

78. *Id.* § 306.

79. *Id.* § 501(a)(1)(A).

80. *Id.* § 501(b).

trative inspection requires a showing that reasonable legislative standards for conducting an inspection are satisfied as to a particular site.

Under the CWCIA, the government will provide to the judge all information supplied by the OPCW regarding the basis for the selection of the facility. The judge shall promptly issue a warrant authorizing the requested routine inspection upon an affidavit showing: the facility is subject to the reporting requirements of the CWCIA, the purpose of the inspection complies with the requirements of the Convention, the items and documents and areas to be searched, the search will not exceed frequency limitations,⁸¹ the site was selected according to Convention procedures, the earliest commencement and latest closing dates and times of the inspection, and the inspection's duration will not exceed Convention time limits. The warrant will specify the same information and the identities of OPCW inspectors and U.S. government representatives.⁸²

b. Criminal Search Warrants for Challenge Inspections

An administrative search warrant may not suffice to authorize a challenge inspection. Unlike routine inspections, a challenge inspection insinuates suspicions of illegal activity — such a non-routine inspection is designed to determine if culpable conduct has occurred. Furthermore, a challenge inspection could occur anywhere, including facilities that are not declared under the CWCIA's reporting obligations. It would be difficult to justify an administrative search of a facility that is otherwise outside of the scope of the CWCIA's regulatory domain.

Recognizing the distinction between routine and challenge inspections, the CWCIA requires, for a challenge inspection where consent is withheld, a criminal search warrant based upon probable cause. The U.S. government shall provide to the judge all information supplied by the OPCW, any information relating to the reasonableness of the facility's selection, information concerning the scope and conduct of the inspection, and the identities of OPCW inspectors and U.S. government representatives. The warrant will specify the same information. If a judge refuses to issue such a warrant on constitutional grounds, the United States would not be obligated to provide access into the challenged facility according to the CWC.

4. Conduct of Inspections

The CWC provisions concerning the conduct of inspections, as discussed above, are not limited with any precision. The inspectors' rights are specified, including rights to inspect documents and records and to interview personnel and to have photographs taken. The limits of those rights are addressed only by broad provisions that the inspectors may not unduly interfere with or delay the facility's operation or affect its safety. Moreover, the CWC provisions focus on the respective rights and obligations of the inspectors and the inspected State Party, but the rights and obligations of facility owners and personnel are to be specified in implementing legislation. The CWCIA fills in some of these gaps.

81. Frequency limitations for a facility having Schedule 2 or 3 chemicals or "other" discrete organic chemicals are one routine inspection per year, and for a facility having Schedule 3 chemicals or "other" discrete organic chemicals, the inspection will not cause the number of routine inspections in the United States to exceed 20 in a calendar year. CWCIA, *supra* note 47, § 305(2)(E).

82. *Id.* § 305(b)(1)-(3).

a. Notice

Under the CWC, notice of an inspection must be given to the inspected State Party at least twenty-four hours in advance for a Schedule 1 facility, forty-eight hours in advance for a Schedule 2 facility, and 120 hours for a Schedule 3 or "other" facility. Such notice must include: (1) the type of inspection; (2) the point of entry; (3) the date and time of arrival at point of entry; (4) the means of arrival; (5) the inspected site; (6) the names of inspectors; and (7) the aircraft clearance for special flights.

Under the CWCIA, the National Authority must give written notice to the owner and the operator, occupant, or agent in charge of the premises within six hours of receiving notification from the OPCW (or as soon as possible). That notice must include: (1) the type of inspection; (2) the basis for the selection of the facility or location; (3) the time and date of the inspection's start; and (4) the names and titles of inspectors.⁸³ The only noteworthy aspect here is the requirement to specify the basis for the facility's selection. As the OPCW is not required under the Convention to include such information in its notification, and as the system for selecting facilities for routine inspections is not precisely developed at this time, it remains to be seen how the National Authority will notify facility owners.

b. Scope

The scope of an inspection under the CWC is quite broad: the inspected State Party may not choose the items to be inspected. The CWCIA restricts the scope of inspections by excluding from access, unless required by the Convention: financial data, sales and marketing data (other than shipment data), pricing data, personnel data, research data, patent data, data maintained for compliance with environmental or occupational health and safety regulations, and personnel and vehicles entering and exiting the facility.⁸⁴ Despite the clause excepting from this exclusion anything required by the Convention this statutory list of exclusions suggests that if the inspectors attempt to gain access to these uninspectable items, National Authority representatives will demand to know why the CWC requires such access.

c. Sampling and Safety

The CWCIA's provision concerning sampling may be the most controversial in the Act. Under the CWC, inspectors may take samples and must, where possible, analyze those samples on-site. If the inspection team deems it necessary, it must transfer samples for analysis off-site at laboratories designated by the OPCW. The inspection team may request that the inspected State Party assist with on-site analysis. The inspected State Party has the right to retain portions of all samples taken or to take duplicate samples.

During the Senate's CWC ratification debates, considerable furor attended the possibility that samples would be taken off-site. The Senate gave its advice and consent on the condition that no sample collected in the United States may be transferred for analysis to any laboratory outside the United States, and this condition has been

83. *Id.* § 304(b).

84. *Id.* § 304(e).

enacted into the CWCIA.⁸⁵ Some OPCW officials have protested this requirement on the grounds that it contradicts the Convention's language and may encourage other States to invoke a similar restraint on inspections which could undermine verification.⁸⁶ Negotiations are on-going between the OPCW and the U.S. National Authority to achieve a workable settlement, but the clarity of the CWCIA's language, for now, cannot be disputed.

E. Penal Measures

CWC Article VII, para. 1(a) requires that each State Party enact penal legislation to prohibit persons from undertaking activities prohibited to a State Party, including the development or use of chemical weapons or riot control agents as a method of warfare.⁸⁷ The CWC requires that penal legislation apply at least to: (1) natural and legal persons anywhere on a State Party's territory or under its jurisdiction; (2) anyone anywhere under its control; or (3) natural persons possessing its nationality anywhere. The CWCIA expands the scope of jurisdiction of United States law to apply, in addition to these three categories, to: prohibited conduct committed against a national of the United States while the national is outside the United States or prohibited conduct committed against property owned, leased, or used by the United States, whether within or outside the United States.⁸⁸ The CWCIA defines "National of the United States" by reference to the Immigration and Nationality Act.⁸⁹

Whether penal sanctions could apply to additional conduct such as producing Schedule 1 chemicals in excess of the CWC's limitations, transferring chemicals to a State in contravention of the CWC's obligations, or obstructing verification activities is left for each State Party to decide. Also left to each State Party to decide is the meaning of the term "penal" as well as the penalties that might result from a violation. Although the CWC does not define the scope of activity to which penal measures must apply, the CWCIA imposes penal consequences for: (1) non-compliance with reporting or inspection obligations of the Act, and (2) activity involving chemical weapons.

1. Non-Compliance with Reporting or Inspection Obligations

As discussed, the CWCIA provides that anyone who willfully fails or refuses to establish or maintain any required record or to submit information to the government or to permit access to any record may be required to pay a civil penalty up to \$5,000 for each violation. Anyone who willfully fails or refuses to permit entry or disrupts, delays, or otherwise impedes a legally authorized inspection will incur a civil penalty of up to \$25,000 for each violation. A knowing violation of either requirement shall also lead to a criminal fine or imprisonment of up to one year, or both.⁹⁰ In addition to these penal measures, the CWCIA also authorizes the courts to restrain any such

85. *Id.* § 304(f).

86. See Ray Moseley, *Senate Bill Could Imperil Arms Ban; Official Warns Chemical Inspection Limits Undermine International Pact*, CHIC. TRIB. May 14, 1998, at 16.

87. Art. VII also requires that States Parties provide each other with the "appropriate form of legal assistance." See BARRY KELLMAN & EDWARD TANZMAN, *MANUAL FOR NATIONAL IMPLEMENTATION OF THE CHEMICAL WEAPONS CONVENTION*, Ch. VI (1993), for a discussion of how this open-ended obligation can be met.

88. 18 U.S.C. § 229(c) (1994).

89. 8 U.S.C. § 1101(a)(22) (1994).

90. CWCIA, *supra* note 47, § 501.

violation and to compel the taking of any required action.⁹¹

Anyone accused of either a record keeping or an inspection violation may have a hearing before an administrative law judge. In determining the amount of a civil penalty, the administrative law judge must consider the circumstances and gravity of the violation, the violator's ability to pay and to continue to do business, any history of prior violations, the degree of culpability, and the existence of an internal compliance program. The judge's decision is final unless the National Authority modifies or vacates it within thirty days. Anyone adversely affected by a final order can seek review within thirty days in the District of Columbia Circuit Court of Appeals or in a circuit where the person resides or transacts business. If a person still fails to comply, the Secretary of State will bring suit to seek compliance plus interest.⁹²

2. Chemical Weapons Activity

The CWCIA adds a new Chapter 11B—Chemical Weapons—to Title 18 of the United States Code. It is now unlawful to knowingly "develop, produce, otherwise acquire, transfer directly or indirectly, receive, stockpile, retain, own, possess, or use, or threaten to use, any chemical weapon" or assist or induce anyone else or attempt or conspire to do so.⁹³ A violator will be fined, imprisoned for any term of years, or both. If someone dies due to such culpable conduct, the violator will be punished by death or life imprisonment. Also, civil penalties of up to \$100,000 per violation may be imposed, and the violator must reimburse the United States for any expenses incurred incident to seizing, transporting, or destroying any property.⁹⁴ Anyone lawfully authorized to deal with chemical weapons pending their destruction or who tries to destroy or seize a chemical weapon in an emergency situation is not thereby culpable.⁹⁵

Any property involved in or derived from the offense will be forfeited, and any profits gained may be double fined. Administrative or judicial proceedings concerning forfeiture will be governed by the Comprehensive Drug Abuse Prevention and Control Act of 1970.⁹⁶ Where there is probable cause to believe that the property would be subject to forfeiture and exigent circumstances threaten the life or health of any person, a temporary restraining order and a warrant authorizing seizure of such property may be issued without notice or hearing before an indictment is filed. Moreover, the United States may obtain an injunction against any prohibited conduct or preparations or solicitations to engage in prohibited conduct. Once seized, the Attorney General will provide, with assistance from the Secretary of Defense, for the property's destruction or disposition at the owner's expense. However, if the property is for a purpose not prohibited under the CWC and is of a type and quantity consistent with that purpose, or if it is an individual self-defense device, forfeiture will not apply.⁹⁷ Finally, any person who violates these provisions may, after notice and hearing, have their export privileges suspended or revoked.⁹⁸

91. *Id.* § 502.

92. *Id.* § 501(2)-(4).

93. 18 U.S.C. § 229(a) (1994).

94. *Id.*

95. *Id.* § 229(b).

96. 21 U.S.C. § 853 (1994).

97. 18 U.S.C. §§ 229B, 229D, 229E (1994).

98. CWCIA, *supra* note 47, § 211.

F. Remedies for and Sanctions Against Property Losses

As discussed, concern over the risk that CWC activities could cause a loss of confidential business information (CBI) has been a crucial sub-text both to the negotiation of the Convention and to the enactment of the CWCIA. The CWC provides extensive measures for the protection of CBI within the OPCW's control and also limits information that must be disclosed as well as that which must be available for inspection in order to minimize the risk of loss. The CWC, however, cannot and does not provide any remedies for lost CBI or other types of property losses, nor can it address how one State Party may choose to deal with foreign entities or other States Parties that may be responsible for property losses. Notable among all CWC implementation legislation, the CWCIA's measures concerning these issues are extensive and offer more opportunities for redressing grievances.

In general, there is no precise legal definition of what information is considered CBI. To clarify that ambiguity, the CWCIA defines "confidential business information" extremely broadly, including: information not subject to inspection (financial data, sales and marketing data, pricing data, personnel data, research data, patent data, and data kept for regulatory compliance); any chemical structure; any plant design process, technology, or operating method; any operating requirement, input, or result that identifies chemicals; any commercial sale, shipment, or use of a chemical⁹⁹

If an OPCW employee or inspector or United States officer or employee takes CBI in connection with CWC compliance, a civil action or claim may be filed in the United States Court of Federal Claims, or in the district courts of the United States if the amount in controversy is less than \$10,000. The claimant must notify the U.S. National Authority at least one year before filing the claim, during which time the action will be stayed so that the National Authority can pursue diplomatic and other remedies to redress the claim.¹⁰⁰ The claimant must show that its proprietary information has been divulged or taken without authorization due to acts or omissions of any OPCW official or inspector. In deciding whether the claimant has satisfied this burden of proof, the Court will consider: the information's value; its availability; whether this information is based on patents, trade secrets, or other intellectual property; the information's significance; and the emergence of technology elsewhere after an inspection.¹⁰¹

If CBI is lost due to the tortious conduct of any officer or employee of the OPCW or the United State government, a civil action for money damages may be brought in a district court. Moreover, any U.S. national or business entity may bring a civil action for money damages in a United States District Court against any foreign national or business entity for an unauthorized or unlawful acquisition, receipt, transmission, or use of property resulting from any tort arising from acts or omissions by an officer or employee of the United States or any OPCW inspector. In any action, either for just compensation for a taking or for tort damages, the United States may not raise sovereign immunity as a defense.¹⁰²

99. *Id.* § 103(g).

100. *Id.* § 103(a)(1)-(3).

101. *Id.* § 103(a)(4).

102. *Id.* § 103(b)-(c), (d)(3).

United States policy is to recoup all funds paid for any tort or taking arising from the acts of any foreign person or OPCW employee pursuant to CWC compliance. The Attorney General is authorized to bring an action in the District Court for the District of Columbia, in any international tribunal, or in the courts of the foreign nation, against any foreign nation which refuses to indemnify the United States for any liability imposed on the United States by virtue of that nation's inspectors who act at its direction or behest.¹⁰³

Sanctions may be imposed on foreign companies or foreign governments for any losses for which the United States is liable for a tort or taking or who assists or encourages the publication or disclosure of CBI. With regard to foreign companies, sanctions include:

- (1) no sales of items on the U.S. munitions list;
- (2) no exports of items on the control list of § 5(c)(1) of the Export Administration Act;
- (3) opposition to loans or assistance by international financial institutions;
- (4) disapproval of credit through the Export-Import Bank;
- (5) prohibition against any U.S. bank from making loans or providing credit;
- (6) block of any property transaction of interest to the foreign company; and
- (7) denial of landing rights.

With regard to foreign governments, the same seven sanctions may apply as well as:

- (1) no licenses for export of items on the U.S. munitions list;
- (2) no funds for economic or military assistance; and
- (3) termination of assistance under the Foreign Assistance Act of 1961.

The President may waive sanctions against foreign governments on the grounds of national security. Sanctions may be suspended after full and complete compensation to the United States government.

Any alien may be denied a visa or excluded from the United States for: (1) having willfully published or disclosed any CBI obtained as a current or former OPCW employee in the course of official duties or of examining any report filed with the OPCW, for which conduct the United States is liable for a tort or taking; (2) trafficking in CBI proven to be owned by a United States national; (3) being a corporate officer, principal, or controlling shareholder of an entity involved in the unauthorized disclosure of CBI; or (4) being a spouse, minor child, or agent of any of the above.¹⁰⁴

III. Conclusion

Unquestionably, no international agreement has posed as many and as burdensome requirements affecting private industry, with as profound constitutional and other legal implications, as the Chemical Weapons Convention. Accordingly, no United States implementing legislation is as intricate as the CWCIA. This intricacy reflects the need to harmonize treaty obligations within the limits of the government's constitutional authority to demand information from and inspect privately-owned enterprises as

103. CWCIA, *supra* note 47, § 103(d)(1)-(2).

104. *Id.* § 103(f).

well as the need to protect those enterprises from property losses, especially involving confidential business information. Persons affected by the Act must appreciate that their legal obligations under it cannot be fully understood without understanding the purpose and objectives of the Convention. It is the CWC together with the CWCIA that embody the applicable law.

