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Tel: 2918 7450
Fax: 2877 5650

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Ms Anita Ho
Assistant Legal Adviser
Legislative Council Secretariat
8 Jackson Road
Central
Hong Kong

Dear Ms Ho,

Chemical Weapons (Convention) Bill

Further to my letter of 1 November, please find at Annex our comments in response to your questions raised in your letter of the same date.

Should you need any further information or clarification, please let me know.

Yours sincerely,

(Ellen Choy)
for Secretary for Commerce and Industry

Encl.

**Chemical Weapons (Convention) Bill –
The Administration’s comments in response to
the questions raised by the LegCo Assistant Legal Adviser
in her letter of 1 November 2001**

Clause 4 - Power of the Director-General of Trade and Industry (Director) to appoint officers in the Clerical Officer Grade to exercise any of the powers and perform any of the duties conferred on the Director by the Ordinance

Clauses 8 to 13 of the Chemical Weapons (Convention) Bill (the CWC Bill) empower the Director to administer a permit and notification system to monitor activities involving chemicals listed in the schedules to the Chemical Weapons Convention (the Convention) or certain unscheduled discrete organic chemicals specified in the Convention. The system entails different duties, some of which are of routine and/or operational nature. To ensure that the system is administered effectively and efficiently, it is necessary for the Director to be able to delegate his powers and duties to officers in different grades and ranks, including officers in the Clerical Officer Grade. The Director will ensure that only officers whose grade and rank commensurate with the responsibilities of the tasks concerned are delegated with the relevant powers and duties.

2. As regards the specific questions raised by the Assistant Legal Adviser in her letter of 1 November 2001 –

- (a) Only limited powers will be delegated to officers in the Clerical Officer Grade. These include the powers to process permit applications, request and examine documents in support of such applications, seek clarifications with the applicants as and when necessary etc. For reference, in accordance with section 4A of the Import and Export Ordinance (see below), the Director has delegated similar powers and duties to Clerical Officers in the administration of various licensing and registration systems, for example, those relating to control on trade in textiles and trade in strategic commodities.
- (b) Section 4A of the Import and Export Ordinance provides that “*the*

Director may appoint in writing any public officer to exercise any of the powers and perform any of the duties conferred or imposed on an appointed officer by [the] Ordinance". In practice, as mentioned above, some powers and duties have been delegated to Clerical Officers. In the CWC Bill, we specify the grades of officers to which the Director may delegate his powers and duties, with a view to enhancing transparency. This approach should be in the interest of the public and welcome by the trade.

- (c) Clause 38 of the CWC Bill provides that an appeal may be made to the Chief Executive against "*any decision of the Director to which [clause] 10(4) applies*", and such decision may relate to the granting, refusal, revocation or suspension of a permit, or the amendment of or addition to the permit conditions. Hence, to the extent that the exercise of power by any public officer under delegated authority represents "*a decision to which [clause] 10(4) applies*", such exercise of power is subject to appeal under clause 38. But as explained above, Clerical Officers will not be delegated with the powers to grant or revoke a permit.

Clause 5 - Use of chemical weapons

3. In the Convention, the definition of "chemical weapons" includes "*toxic chemicals and their precursors, except where intended for purposes not prohibited under this Convention, as long as the types and quantities are consistent with such purposes*", whereas "purposes not prohibited under this Convention" refer to "*industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes*" among other things. In other words, toxic chemicals and their precursors that are intended for peaceful purposes permitted under the Convention are excluded from the definition of "chemical weapons". The same definition of "chemical weapons" is adopted in the CWC Bill by virtue of clause 2(2) (which provides that a term used in the Ordinance and in the Convention, but which is not defined in the Ordinance, has the same meaning as in the Convention).

4. Since the CWC Bill adopts a definition of "chemical weapons" that excludes toxic chemicals and their precursors intended for peaceful purposes, we believe it is not necessary to set out exclusions or provide further explanations in

respect of the scope of clause 5. Neither do we consider it desirable to have a different definition of “chemical weapons” in the Bill; so doing may give rise to uncertainties regarding the meanings of other terms defined in the Convention but not in the Bill.

5. The Assistant Legal Adviser has made reference to the UK Chemical Weapons Act 1996. We note that “chemical weapons” is defined in section 1(1) of that Act as including “*toxic chemicals and their precursors*” among other things. It appears that toxic chemicals and their precursors intended for peaceful purposes permitted by the Convention are not excluded from the definition, hence the need to provide for the exclusion and explanation in section 2(2) of that Act.

***Clause 7 - Notification of the finding of an article believed to be a chemical weapon;
Clause 29 - Part 2 offences, subsection (4)***

6. Clause 7(1) of the CWC Bill requires a person to notify the enforcement agencies of the finding of an article believed to be a chemical weapon, so that the Administration can take appropriate actions to protect public safety, as well as to prepare declarations and to dispose of the chemical weapons found as required by the Convention. The notification requirement applies to chemical weapons, which as explained in para. 3 above, do not include toxic chemicals and their precursors intended for peaceful purposes.

7. Clause 7(1) of the Bill was modeled on section 13 of the Chemical Weapons (Prohibition) Act of Australia. Section 13 reads, “*if a person finds a substance or article, whether in Australia or an external Territory, or on, or in the seas above, the continental shelf adjacent to Australia or an external territory, that the person believes may be a chemical weapon, the person must immediately notify the Director [of the Chemical Weapons Convention Office] or a constable of the finding, and of the whereabouts, of the substance or article concerned*”. The maximum penalty for contravention of this provision is imprisonment for one year. The Australian Act has been in operation since 1994, and we are not aware of any concerns regarding the operation of section 13 so far.

8. At the meeting of the LegCo Panel on Commerce and Industry held on 9 July 2001, a Member expressed concern that if the notification requirement was couched in too general terms, it might affect the operations of the businesses.

The Assistant Legal Adviser has also pointed out that for a person to believe an article to be a chemical weapon is a subjective test, which may be difficult to prove.

9. In view of these comments, we have reviewed the wording of clause 7(1) in consultation with the Department of Justice. We consider it reasonable to have a “belief” test as it would be difficult for an ordinary citizen to determine whether an article “is” a chemical weapon, and it would not be in the public’s best interest if the notification requirement only applies when a person is sure that an article is a chemical weapon. On the other hand, we concur that it may be difficult to prove that a person indeed believes an article is a chemical weapon.

10. Having regard to the considerations above, we now intend to propose an amendment to clause 7(1) by adding “*reasonably*” before “*believes*”. With the proposed amendment, a person’s legal obligation to notify the enforcement agencies of the discovery of a possible chemical weapon will only be triggered if the person has reasonable grounds to believe that the article is a chemical weapon. The amendment will also introduce an objective element into the prosecution process; prosecutors will need to prove what a reasonable man would have believed in the circumstances, rather than to prove what the person charged with the offence actually believes.

11. The Assistant Legal Adviser has also asked, in respect of an offence under Clause 7(1), whether defence provision similar to that in clause 29(2) of the Bill should be provided in clause 29(4). Our lawyer has advised that if clause 7(1) were to be amended as proposed in para. 10 above, there would not be a need to include defence provisions.

Clauses 9, 10 and 11 - Application for and grant of a permit, and notification to Director

12. Our current thinking is not to impose any fee on applications for a permit under the CWC Bill. We may review this in the future in the light of the implementation of the Ordinance.

13. The Government conducted two rounds of surveys among manufacturers, traders, medical and research institutions, testing laboratories etc in

November 1998 and June 2001 respectively to ascertain the impact of the Ordinance on these establishments. We found that only a small number of establishments were engaged in activities involving chemicals controlled under the Bill. Among them, most were engaged in the import and use of chemicals listed in the schedules (they had obtained import licences from Trade and Industry Department for the chemicals concerned under the Import and Export Ordinance). In the 1998 survey, only 8 industrial undertakings were found involved in the production of chemicals controlled under the Convention or activities of potential relevance. The corresponding number for the 2001 survey is 4. In view of the survey findings, we believe that the implementation of the Ordinance would not impose a material burden on the relevant establishments.

Clause 12 - Reports to be submitted by permit holders

14. By virtue of clause 2(2) of the CWC Bill, “the Organization” in clause 12(2)(a)(v) has the same meaning as the same term in the Convention, which refers to the Organization for the Prohibition of Chemical Weapons established pursuant to Article VIII of the Convention.

Clause 38 - Appeals

15. As mentioned in para. 2(c) above, clause 38 of the CWC Bill provides that a person may appeal to the Chief Executive against “*any decision of the Director to which [clause] 10(4) applies*”, and such decision may relate to the granting, refusal, revocation or suspension of a permit, or the amendment of or addition to the permit conditions. Similar appeal channel is provided for in section 6 of the Import and Export Ordinance, under which a person aggrieved by a decision, act or omission of the Director or the Commissioner of the Customs and Excise or of any other public officer taken, done or made in the exercise of any powers or the performance of any duties under that Ordinance may lodge an appeal to the Chief Executive. Given that the powers of the Director under the Import and Export Ordinance and the CWC Bill are broadly similar, we believe it is reasonable to adopt the same appeal arrangement.

Follow-up on concerns expressed by Members of the LegCo Panel on Commerce and Industry at the Panel meeting held on 9 July 2001

16. We consulted the LegCo Panel on Commerce and Industry on 9 July 2001 on our proposal to introduce new legislation to fully implement the Convention in Hong Kong. Members generally supported our proposal, although some of them expressed concerns about specific aspects of the proposed legislation.

17. A few Members expressed concerns about the impact of the proposed legislation on the operations of the businesses. As explained in para. 13 above, we believe that the implementation of the Ordinance should not impose a material burden on the local chemical industry and other relevant institutions.

18. Separately, one Member expressed concern that if the notification requirement in relation to the finding of an article believed to be a chemical weapon was couched in too general terms, it might affect the operations of the businesses. This is addressed in para. 8 to 10 above.

19. Moreover, a Member suggested that the Government provided references to similar legislation elsewhere where appropriate to facilitate LegCo Members' consideration of the CWC Bill. As we pointed out at the Panel meeting, in drafting the CWC Bill, the Administration had made reference to the relevant legislation of Australia and the United Kingdom. The Bill now sets out cross-references to the relevant provisions in the Australian and UK legislation.

Commerce and Industry Bureau
November 2001