

LC Paper No. CB(1)59/02-03(05)

Your ref: LS/B/2/01-02
Our ref: CIB CR 14/46/6/1

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12 October 2002

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8 Jackson Road
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Dear Ms Ho,

Chemical Weapons (Convention) Bill

Please find enclosed a note (in both Chinese and English) that set out the Administration's replies to your questions raised in your letter dated 24 April 2002.

Yours sincerely,

(Ellen Choy)
for Secretary for Commerce, Industry and Technology

**Chemical Weapons (Convention) Bill –
The Administration’s comments in response to
the questions raised by the LegCo Assistant Legal Adviser
in her letter of 24 April 2002**

Under what circumstances will the possession of toxic chemicals listed in the Schedules to the Chemical Weapons Convention become an offence under Clause 5?

The Administration has set out its views on the interpretation of clause 5 of the Chemical Weapons (Convention) Bill (the CWC Bill) in a note forwarded to the Clerk to Bills Committee on 17 May 2002. To recapitulate, under the CWC Bill, toxic chemicals listed in the three schedules to the Convention (“Scheduled chemicals”) *intended for industrial, agricultural, research, medical, pharmaceutical or other peaceful purposes*, are not regarded as chemical weapons, as long as the types and quantities are consistent with such purposes. As such, the possession of “Scheduled chemicals” for peaceful purposes per se will not be guilty of an offence, although the persons concerned may need to comply with certain permit and documentation requirements.

Control over chemicals

2. All “Scheduled chemicals” and certain organic compounds that may fall within the definition of “unscheduled discrete organic chemicals”¹ (UDOCs) under the CWC Bill are listed in the Schedules to the Import and Export (Strategic Commodities) Regulations, and thereby are subject to import and export licensing control under the Import and Export Ordinance. The licensing system is administered by the Trade and Industry Department which therefore has record of the movements of such chemicals into and out of HK.

3. The ALA requested for some examples of UDOCs which are produced in Hong Kong and the production of which might have to be notified to the Director-General of Trade and Industry under clause 11 of the CWC Bill. As we explained before, the notification requirement is triggered if the total amount of UDOCs produced in the preceding year exceeded 200 tonnes or 30 tonnes, depending on the types of chemicals. The 1998 and 2001 surveys

¹ Examples include lubricating materials, propellant additives and agents.

revealed that three factories had produced UDOCs in the year before. One of these factories indicated that it had produced over 200 tonnes of textile auxiliaries (e.g. polyglycol fatty acid ester). The other two factories had produced free fatty acids for the manufacture of soap and pharmaceutical intermediate respectively. In both cases, the amount of chemicals produced did not exceed the threshold of 200 tonnes.

4. The Weapons of Mass Destruction (Control of Provision of Services) Ordinance prohibits the *provision of services* that will or may assist the development, production, acquisition and stockpiling of chemical, biological and nuclear weapons or that will or may assist the means of delivery of such weapons. It does not impose control on the use, production or possession of “Scheduled chemicals” or UDOCs.

5. The ALA mentioned in her letter of 24 April 2002 a few other ordinances that impose some form of control over chemicals. We have set out these ordinances’ respective scopes of control at Annex A.

Possession or use of chemical weapons

6. The ALA asked whether the possession or use of chemical weapons was already a criminal offence under the provisions of a number of existing ordinances.

7. Clause 5 of the CWC Bill provides that no person shall use, develop, produce, possess, participate in the transfer of any chemical weapon, or engage in military preparations for the use of a chemical weapon. It therefore prohibits the use, possession etc of chemical weapons in all circumstances. On the other hand, s.13 of the Offences Against the Persons Ordinance², s.16 of the Firearms and Ammunition Ordinance³, s.53 of the

² S.13 of the Offences Against the Person Ordinance specifies that “*any person who -*
 (a) *attempts to administer to, or attempts to cause to be administered to or to be taken by, any person any poison or other destructive thing; or*
 (b) *shoots at any person; or*
 (c) *by drawing a trigger or in any other manner, attempts to discharge any kind of loaded arms at any person; or*
 (d) *attempts to drown, suffocate, or strangle any person, with intent in any of such cases to commit murder, shall, whether any bodily injury is effected or not, be guilty of an offence.*”

Crimes Ordinance⁴ and s.33 of the Public Order Ordinance⁵ may be invoked when a chemical weapon is used in specific situations within the scope of the respective offence provisions. Clause 5 of the CWC Bill is therefore wider in the scope of control insofar as chemical weapons are concerned. It is also worth noting that the relevant provisions in the above-mentioned ordinances prohibit certain criminal acts regardless of whether chemical weapon is involved.

8. The ALA also specifically asked about the relationship between clause 5(f) of the CWC Bill and the Weapons of Mass Destruction (Control of Provision of Services) Ordinance. While the former makes it an offence if a person *assists, encourages or induces*, in any way, anyone to engage in any activity prohibited under the Chemical Weapons Convention, the latter prohibits *acts* to provide certain services. Hence the scope of coverage of the former is wider than that of the latter.

Schedule 1

9. The provisions of the Bill cannot be fully understood without the Convention and, in our view, it is more user friendly to set out the full text of the Chemical Weapons Convention in Schedule 1 to the CWC Bill. The readers would not need to refer to the Convention separately. Indeed, the full text of the Convention is similarly set out in the Schedule to the Australian Chemical Weapons (Prohibition) Act 1994.

10. Although the Central People's Government extended the application of the Convention to the HKSAR under Article 153 of the Basic Law, the Convention does not automatically have the full force and effect of law

³ S.16 of the Firearms and Ammunition Ordinance specifies that "*a person commits an offence who has in his possession any arms or ammunition with intent by means thereof to endanger life or to enable another person by means thereof to endanger life*".

⁴ S.53 of the Crimes Ordinance specifies that "*any person who unlawfully and maliciously causes by any explosive substance an explosion of a nature likely to endanger life or to cause serious injury to property shall, whether any injury to person or property has been actually caused or not, be guilty of an offence*".

⁵ S.33 of the Public Order Ordinance specifies that "*any person who, without lawful authority or reasonable excuse, has with him in any public place any offensive weapon shall be guilty of an offence*".

in Hong Kong. It is the CWC Bill which provides the legislative means to give effect to the requirements of the Convention. The Convention, in the form of Schedule 1 to the CWC Bill, will of course be part of the law of Hong Kong if the CWC Bill is enacted, but only in the sense that it is incorporated into the Hong Kong statute book. The provisions of the Convention are not self-executing in Hong Kong unless they are specifically brought into play by the provisions of the Bill.

11. The Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction (copy at Annex B), if compared with the Chemical Weapons Convention, is less elaborate and does not provide for the detailed mechanism for implementation. Given the differences between the two Conventions, we do not see any compelling reasons to adopt the same approach in handling the text of the Convention.

Chinese version

12. The ALA commented that the Chinese version of clauses 10(3), 13(2), 15(2), 21(7) and (13)(b), 24(2), 38(1) and 43 did not seem to match with the English version. We have, together with the Department of Justice, reviewed the said provisions, but do not consider there is any discrepancy between the two texts in terms of contents.

Commerce, Industry and Technology Bureau
October 2002

Legislation which Imposes Control over Chemicals

Description	Are “Scheduled chemicals” subject to control under the Ordinance?	Are unscheduled discrete organic chemicals ¹ (UDOCs) subject to control under the Ordinance?
<i>1. Control of Chemicals Ordinance (Cap. 145)</i>		
<p>In very general terms, the Control of Chemicals Ordinance imposes licensing control over the <i>import or export, and manufacture</i> of certain specified chemicals which can be used in the production of narcotic drugs or psychotropic substances. The controlled chemicals are listed in the three schedules to the Ordinance.</p>	<p>None of the “Scheduled chemicals” is included in any of the schedules to the Control of Chemicals Ordinance.</p>	<p>Some organic compounds that fall within the meaning of UDOCs under the Chemical Weapons (Convention) Bill (CWC Bill) are included in the schedules to the Control of Chemicals Ordinance.</p> <p>Given the very high threshold for the notification requirement for production of UDOCs under the CWC Bill (200 or 30 tonnes depending on the types of chemicals), it is very unlikely that a facility operator who needs to have a licence to produce certain organic compounds under the Control of Chemicals Ordinance will need to make a notification under the CWC Ordinance as well.</p>

¹ As a recap, discrete organic chemicals refer to chemicals belonging to the class of chemical compounds consisting of all compounds of carbon except for its oxides, sulphides and metal carbonates. A facility operator needs to make a notification if he produced in the preceding year any UDOCs and the total amount exceeded 200 tonnes; or any UDOCs that contain phosphorus, sulphur or fluorine and the total amount exceeded 30 tonnes.

Description	Are “Scheduled chemicals” subject to control under the Ordinance?	Are unscheduled discrete organic chemicals (UDOCs) subject to control under the Ordinance?
2. <i>Dangerous Drugs Ordinance (Cap. 134)</i>		
<p>The Dangerous Drugs Ordinance requires a person who is involved in the manufacture, traffic, possession and use of a dangerous drug to obtain a licence from the Director of Health. Dangerous drug refers to the drugs or substances specified in Part I of the First Schedule to the Ordinance.</p>	<p>None of the “Scheduled chemicals” is included in Part I of the First Schedule to the Dangerous Drugs Ordinance.</p>	<p>Some organic compounds that fall within the meaning of UDOCs under the CWC Bill are included in Part I of the First Schedule to the Dangerous Drugs Ordinance.</p> <p>Given the very high threshold for the notification requirement for production of UDOCs under the CWC Bill (200 or 30 tonnes depending on the types of chemicals), it is very unlikely that a facility operator who needs to have a licence to produce certain organic compounds under the Dangerous Drugs Ordinance will need to make a notification under the CWC Ordinance as well.</p>

Description	Are “Scheduled chemicals” subject to control under the Ordinance?	Are unscheduled discrete organic chemicals (UDOCs) subject to control under the Ordinance?
3. Dangerous Goods Ordinance (Cap. 295)		
<p>The Dangerous Goods Ordinance requires a person who <i>manufactures, stores, conveys or uses</i> any dangerous goods to obtain a licence. Such goods include all explosives, compressed gases, petroleum and other substances giving off inflammable vapours, substances giving off poisonous gas or vapour, corrosive substances, substances which become dangerous by interaction with water or air, substances liable to spontaneous combustion or of a readily combustible nature, as well as radioactive material.</p>	<p>15 “Scheduled chemicals” are controlled by the Dangerous Goods Ordinance, among which 2 are “Schedule 2 chemicals” and 13 are “Schedule 3 chemicals”.</p> <p>According to the 1998 and 2001 surveys, only one research institute indicated that it had used two “Schedule 2 chemicals” for research purpose, and only one factory indicated that it had produced a “Schedule 3 chemical”. Of the three chemicals concerned, only one “Schedule 2 chemical” used for research purpose is controlled by the Dangerous Goods Ordinance. However, the threshold for the permit requirement for the production or use of the “Schedule 2 chemical” under the CWC Bill is 1 tonne. It is very unlikely that the research institute using that chemical for research purpose will need to obtain a permit under the CWC Ordinance.</p>	<p>Some organic compounds that fall within the meaning of UDOCs under the CWC Bill are controlled by the Dangerous Goods Ordinance.</p> <p>Given the very high threshold for the notification requirement for production of UDOCs under the CWC Bill (200 or 30 tonnes depending on the types of chemicals), it is very unlikely that a facility operator which needs to have a licence to produce certain organic compounds under the Dangerous Goods Ordinance will need to make a notification under the CWC Ordinance as well.</p>

Description	Are “Scheduled chemicals” subject to control under the Ordinance?	Are unscheduled discrete organic chemicals (UDOCs) subject to control under the Ordinance?
4. Pharmacy and Poisons Ordinance (Cap. 138)		
To protect public health and safety, the Pharmacy and Poisons Ordinance requires registration of pharmacists and of persons engaged in the business as an importer or exporter of pharmaceutical products. It also requires a person who manufactures pharmaceutical products and sells poisons to obtain a licence issued by the Pharmacy and Poisons Board.	None of the “Scheduled chemicals” is subject to the control of the Pharmacy and Poisons Ordinance.	Some organic compounds that fall within the meaning of UDOCs under the CWC Bill are controlled by the Pharmacy and Poisons Ordinance. Given the very high threshold for the notification requirement for production of UDOCs under the CWC Bill (200 or 30 tonnes depending on the types of chemicals), it is very unlikely that a facility operator who needs to have a license to produce certain organic compounds under the Pharmacy and Poisons Ordinance will need to make a notification under the CWC Ordinance as well.
5. Waste Disposal Ordinance (Cap. 354)		
To ensure public safety and to protect the environment, the Ordinance requires places and persons connected with the production, storage, collection and disposal of waste (including chemical waste ²) to be licensed and registered with the Director of Environmental Protection.	A facility operator who produces, uses, processes etc “Scheduled chemicals” might be required to register with the Environmental Protection Department as a waste producer if in the course of the above activities chemical waste is generated.	A facility operator who produces UDOCs might be required to register with the Environmental Protection Department as a waste producer if in the course of the above activities chemical waste is generated.

² Under the Waste Disposal Ordinance, chemical waste refers to any substance being scrap material, effluent and unwanted substance or by product arising from the application of or in the course of any process or trade activity, if such substance may cause pollution or constitute a danger to health or risk of pollution to the environment.

Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons and on Their Destruction

Signed at Washington, London, and Moscow April 10, 1972

Ratification advised by U.S. Senate December 16, 1974

Ratified by U.S. President January 22, 1975

U.S. ratification deposited at Washington, London, and Moscow March 26, 1975

Proclaimed by U.S. President March 26, 1975

Entered into force March 26, 1975

The States Parties to this Convention,

Determined to act with a view to achieving effective progress towards general and complete disarmament, including the prohibition and elimination of all types of weapons of mass destruction, and convinced that the prohibition of the development, production and stockpiling of chemical and bacteriological (biological) weapons and their elimination, through effective measures, will facilitate the achievement of general and complete disarmament under strict and effective international control,

Recognizing the important significance of the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925, and conscious also of the contribution which the said Protocol has already made, and continues to make, to mitigating the horrors of war,

Reaffirming their adherence to the principles and objectives of that Protocol and calling upon all States to comply strictly with them,

Recalling that the General Assembly of the United Nations has repeatedly condemned all actions contrary to the principles and objectives of the Geneva Protocol of June 17, 1925,

Desiring to contribute to the strengthening of confidence between peoples and the general improvement of the international atmosphere,

Desiring also to contribute to the realization of the purposes and principles of the Charter of the United Nations,

Convinced of the importance and urgency of eliminating from the arsenals of States, through effective measures, such dangerous weapons of mass destruction as those using chemical or bacteriological (biological) agents,

Recognizing that an agreement on the prohibition of bacteriological (biological) and toxin weapons represents a first possible step towards the achievement of agreement on effective measures also for the prohibition of the development, production and stockpiling of chemical weapons, and determined to continue negotiations to that end,

Determined, for the sake of all mankind, to exclude completely the possibility of bacteriological (biological) agents and toxins being used as weapons,

Convinced that such use would be repugnant to the conscience of mankind and that no effort should be spared to minimize this risk,

Have agreed as follows:

Article I

Each State Party to this Convention undertakes never in any circumstances to develop, produce, stockpile or otherwise acquire or retain:

- (1) Microbial or other biological agents, or toxins whatever their origin or method of production, of types and in quantities that have no justification for prophylactic, protective or other peaceful purposes;
- (2) Weapons, equipment or means of delivery designed to use such agents or toxins for hostile purposes or in armed conflict.

Article II

Each State Party to this Convention undertakes to destroy, or to divert to peaceful purposes, as soon as possible but not later than nine months after the entry into force of the Convention, all agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, which are in its possession or under its jurisdiction or control. In implementing the provisions of this article all necessary safety precautions shall be observed to protect populations and the environment.

Article III

Each State Party to this Convention undertakes not to transfer to any recipient whatsoever, directly or indirectly, and not in any way to assist, encourage, or induce any State, group of States or international organizations to manufacture or otherwise acquire any of the agents, toxins, weapons, equipment or means of delivery specified in article I of the Convention.

Article IV

Each State Party to this Convention shall, in accordance with its constitutional processes, take any necessary measures to prohibit and prevent the development, production, stockpiling, acquisition, or retention of the agents, toxins, weapons, equipment and means of delivery specified in article I of the Convention, within the territory of such State, under its jurisdiction or under its control anywhere.

Article V

The States Parties to this Convention undertake to consult one another and to cooperate in solving any problems which may arise in relation to the objective of, or in the application of the provisions of, the Convention. Consultation and cooperation pursuant to this article may also be undertaken through appropriate international procedures within the framework of the United Nations and in accordance with its Charter.

Article VI

(1) Any State Party to this Convention which finds that any other State Party is acting in breach of obligations deriving from the provisions of the Convention may lodge a complaint with the Security Council of the United Nations. Such a complaint should include all possible evidence confirming its validity, as well as a request for its consideration by the Security Council.

(2) Each State Party to this Convention undertakes to cooperate in carrying out any investigation which the Security Council may initiate, in accordance with the provisions of the Charter of the United Nations, on the basis of the complaint received by the Council. The Security Council shall inform the States Parties to the Convention of the results of the investigation.

Article VII

Each State Party to this Convention undertakes to provide or support assistance, in accordance with the United Nations Charter, to any Party to the Convention which so requests, if the Security Council decides that such Party has been exposed to danger as a result of violation of the Convention.

Article VIII

Nothing in this Convention shall be interpreted as in any way limiting or detracting from the obligations assumed by any State under the Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, signed at Geneva on June 17, 1925.

Article IX

Each State Party to this Convention affirms the recognized objective of effective prohibition of chemical weapons and, to this end, undertakes to continue negotiations in good faith with a view to reaching early agreement on effective measures for the prohibition of their development, production and stockpiling and for their destruction, and on appropriate measures concerning equipment and means of delivery specifically designed for the production or use of chemical agents for weapons purposes.

Article X

(1) The States Parties to this Convention undertake to facilitate, and have the right to participate in, the fullest possible exchange of equipment, materials and scientific and technological information for the use of bacteriological (biological) agents and toxins for peaceful purposes. Parties to the Convention in a position to do so shall also cooperate in contributing individually or together with other States or international organizations to the further development and application of scientific discoveries in the field of bacteriology (biology) for prevention of disease, or for other peaceful purposes.

(2) This Convention shall be implemented in a manner designed to avoid hampering the economic or technological development of States Parties to the Convention or international cooperation in the field of peaceful bacteriological (biological) activities, including the international exchange of bacteriological (biological) agents and toxins and equipment for the processing, use or production of bacteriological (biological) agents and toxins for peaceful purposes in accordance with the provisions of the Convention.

Article XI

Any State Party may propose amendments to this Convention. Amendments shall enter into force for each State Party accepting the amendments upon their acceptance by a majority of the States Parties to the Convention and thereafter for each remaining State Party on the date of acceptance by it.

Article XII

Five years after the entry into force of this Convention, or earlier if it is requested by a majority of Parties to the Convention by submitting a proposal to this effect to the Depositary Governments, a conference of States Parties to the Convention shall be held at Geneva, Switzerland, to review the operation of the Convention, with a view to assuring that the purposes of the preamble and the provisions of the Convention, including the provisions concerning negotiations on chemical weapons, are being realized. Such review shall take into account any new scientific and technological developments relevant to the Convention.

Article XIII

(1) This Convention shall be of unlimited duration.

(2) Each State Party to this Convention shall in exercising its national sovereignty have the right to withdraw from the Convention if it decides that extraordinary events, related to the subject matter of the Convention, have jeopardized the supreme interests of its country. It shall give notice of such withdrawal to all other States Parties to the Convention and to the United Nations Security Council three months in advance. Such notice shall include a statement of the extraordinary events it regards as having jeopardized its supreme interests.

Article XIV

(1) This Convention shall be open to all States for signature. Any State which does not sign the Convention before its entry into force in accordance with paragraph (3) of this Article may accede to it at any time.

(2) This Convention shall be subject to ratification by signatory States. Instruments of ratification and instruments of accession shall be deposited with the Governments of the United States of America, the United Kingdom of Great Britain and Northern Ireland and the Union of Soviet Socialist Republics, which are hereby designated the Depositary Governments.

(3) This Convention shall enter into force after the deposit of instruments of ratification by twenty-two Governments, including the Governments designated as Depositaries of the Convention.

(4) For States whose instruments of ratification or accession are deposited subsequent to the entry into force of this Convention, it shall enter into force on the date of the deposit of their instruments of ratification or accession.

(5) The Depositary Governments shall promptly inform all signatory and acceding States of the date of each signature, the date of deposit of each instrument of ratification or of accession and the date of the entry into force of this Convention, and of the receipt of other notices.

(6) This Convention shall be registered by the Depositary Governments pursuant to Article 102 of the Charter

of the United Nations.

Article XV

This Convention, the English, Russian, French, Spanish and Chinese texts of which are equally authentic, shall be deposited in the archives of the Depositary Governments. Duly certified copies of the Convention shall be transmitted by the Depositary Governments to the Governments of the signatory and acceding states.

IN WITNESS WHEREOF the undersigned, duly authorized, have signed this Convention.

DONE in triplicate, at the cities of Washington, London and Moscow, this tenth day of April, one thousand nine hundred and seventy-two.