

LS/B/10/01-02

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Commerce, Industry and Technology Bureau
(Attention: Ms Ellen Choy,
Secretary for Commerce, Industry and
Technology, Principal Assistant Secretary)
Level 29 One Pacific Place
88 Queensway
Hong Kong

6 August 2002

BY FAX & BY POST

Fax No. : 2877 5650

Total no. of page(s) : (7)

Dear Ms Choy,

Chemical Weapons (Convention) Bill

I refer to the above bill and the paper "Comparison of the Chemical Weapons (Convention) Bill to the Australian Chemical Weapons (Prohibition) Act 1994 and the UK Chemical Weapons Act 1996" (LC Paper No. CB(1)2206/01-02 (01)) and would like to seek your clarification on the following.

Clauses 5 and 29

2. Clause 5(f) of the bill provides that "[N]o person shall assist, encourage or induce, in any way, anyone to engage in any activity prohibited under the Convention". The wording of this provision is not exactly the same as Article 1(d) of the Convention nor section 12(e) of the Australian Act. The United Kingdom which enacted the Chemical Weapons Act two years later than Australia did not have a similar provision. Could you please explain the purpose of clause 5(f) and list out the activities that are prohibited under the Convention?

3. Whilst clause 5 states the acts that are to be prohibited, clause 29 provides for the penalty and the defence in connection with clause 5. Under clause 29(2) of the bill, it is a defence for a person charged with an offence under clause 5(a), (b), (c) or (d) to prove that he neither knew nor suspected that the article was a chemical weapon. Why is the defence provision not applicable to clause 5(e) and (f)?

Clauses 7 and 29(4)

4. Under clauses 7 and 29(4), a person commits an offence if he finds an article which he believes may be a chemical weapon and he fails to notify a member of the Customs and Excise Service or an authorized officer. There is no such

corresponding provision in the U.K. Act. Nor is there a similar offence in the Biological Weapons Ordinance (Cap. 491) and the Weapons of Mass Destruction (Control of Provision of Services) Ordinance (Cap. 526). Please explain the rationale for creating this offence and fixing the penalty at a fine of \$100,000 and imprisonment for 6 months.

Clauses 8 and 30

5. Clause 8 provides for the circumstances under which an operator of a facility has to require an operation permit. It is modelled on section 16 of the Australian Act with some variation in wording. Under clause 8(1) of the bill, the words "in all the circumstances of the case, a reasonable person would conclude that" are added. Could you please explain the rationale for adding these words?

6. Under section 77 of the Australian Act, if a person "intentionally or recklessly" produces Schedule 1 chemicals without, or otherwise than in accordance with a permit, commits an offence. It is noted that under clause 30(1)(b) of the bill, the words "intentionally or recklessly" are omitted. Is there any special reason for omitting the mens rea element from the offence under clause 30?

Clauses 13 and 31

7. Under clauses 13 and 31, if a person fails to comply with a notice from the Director without reasonable excuse, he is liable on conviction to a fine of \$100,000 and to imprisonment for 1 year. Section 22(3) of the U.K. Act provides for two levels of penalty, one is on summary conviction and the other is on conviction on indictment. Should there be a provision for summary conviction with a lower penalty?

Clause 14(1)(a)

8. A member of the Customs and Excise Service or an authorized officer may enter and search any premises where a declared facility is located. Is a search warrant required? "Declared facility" is defined to mean a Schedule 1, 2 or 3 facility or any other chemical production facility. At present, how many "any other chemical production facilities" have been established in Hong Kong?

Clauses 28 and 34

9. Clause 28 is similar to section 32 of the U.K. Act except clause 28(2)(i) and in clause 28(2)(c), the words "in the performance of duties imposed by this Ordinance or" are added. Please explain the purpose of the addition.

Clause 35

10. Under section 26 of the Import and Export Ordinance (Cap. 60), any person who obstructs a member of the Customs and Excise Service or an authorized officer in the exercise of his duties commits an offence and is liable on conviction to a

fine of \$10,000 and to imprisonment for 6 months. Under section 14 of the Weapons Ordinance (Cap. 217), the penalty for a similar offence is fixed at a fine of \$3,000 and to imprisonment for 6 months. Is there any reason for the fine to be fixed at \$100,000 for a similar offence in the bill? Further, would the Administration consider adding the word "wilfully" before the word "obstructs" as in clause 33(1)(c) of the bill?

Schedule 1 - The Convention

11. Is Schedule 1 the latest version of the Convention? I have checked the web site of the Convention and noted that in Part VI of the Verification Annex to the Convention, a new paragraph 5bis. is added: "[F]or quantities of 5 milligrams or less, the Schedule 1 chemical saxitoxin shall not be subject to the notification period in paragraph 5 if the transfer is for medical/diagnostic purposes. In such cases, the notification shall be made by the time of transfer." Is Hong Kong obliged to enact this provision?

12. With regard to the Chinese version, some typographical errors are noted.

- (a) On p. C1350 of the blue bill, under section 38(c), should the term be "支助" and not "資助"?
- (b) On the content page of the Verification Annex under Part VIII (p. C1388), should "的制度" be added after "設施"?
- (c) On p. C1410, under paragraph 46, should the term be "異議" and not "導議"? and
- (d) On p. C1470, under Part VI, paragraph A2(d), should it be "任何一年" and not "任一年"?

13. The marked-up copies are enclosed herewith for your easy reference.

14. I would be grateful if you could let me have a reply to my second letter dated 24 April 2002 as well as this letter in both English and Chinese by the end of September 2002.

Yours sincerely,

(Anita HO)
Assistant Legal Adviser

Encl.

c.c. Department of Justice (Attn: Mr. Geoffrey FOX, SALD and
Ms Marie SIU, SGC)

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- (c) 向大會、執行理事會和各附屬機構提供行政和技術協助；
- (d) 代表本組織就有關本公約的執行的事項向各締約國發送函件並接收各締約國的來文；
- (e) 在執行本公約條款的過程中向各締約國提供技術援助和技術評估，包括評估附表所列的和附表未列的化學品。
39. 技術秘書處應：
- (a) 同各締約國談判關於核查活動的進行的協定或安排，交由執行理事會核准；
- (b) 至遲於本公約生效後 180 天，協調建立並維持各締約國按照第十條第 7 款 (b) 和 (c) 項提供的緊急援助和人道主義援助的永久性儲備。技術秘書處可檢查所儲備的物品是否合用。將予儲備的物品的清單應由大會根據以上第 21 款 (i) 項予以審議和核准；
- (c) 管理第十條中提到的自願基金，匯編各締約國所作的宣布，並於收到要求時對各締約國之間或一締約國同本組織之間為第十條的目的締結的雙邊協定進行登記。
40. 技術秘書處應向執行理事會通報在履行其職能方面出現的任何問題，包括其在進行核查活動中注意到的和其未能通過與有關締約國協商加以解決或澄清的關於遵守本公約與否的疑問、不明確或不肯定的情況。
41. 技術秘書處的組成應為：作為主管和行政首長的總幹事一名、視察員和可能需要的科學、技術及其他人員。
42. 視察團應是技術秘書處的一個單位，並應在總幹事的監督下行事。
43. 總幹事應由大會根據執行理事會的推薦任命，任期 4 年，可續任一屆，但其後不得再續。
44. 總幹事應就技術秘書處的工作人員任命以及組織和工作對大會和執行理事會負責。僱用工作人員和決定服務條件的首要考慮應是必須確保其工作人員具有合乎最高標準的效率、能力和品格。總幹事、視察員或其他專業及辦事人員必須由締約國公民擔任。應妥為顧及在盡可能廣泛的地域基礎上徵聘工作人員的重要性。應按照工作人員盡量精簡而又可適當履行技術秘書處職責這一原則進行徵聘。
45. 總幹事應負責第 21 款 (h) 項中提到的科學諮詢委員會的組織和開展工作。總幹事應與各締約國協商任命科學諮詢委員會的成員，這些成員應以個人身分任職。委員會成員的任命應以其與本公約的執行有關的特定科學領域的專門知識作為依據。如果適當，總幹事也可與委員會成員協商設立科學專家臨時工作小組，以便就具體問題提出建議。為實施上述規定，各締約國可向總幹事提交專家名單。

- (c) Provide administrative and technical support to the Conference, the Executive Council and subsidiary organs;
- (d) Address and receive communications on behalf of the Organization to and from States Parties on matters pertaining to the implementation of this Convention;
- (e) Provide technical assistance and technical evaluation to States Parties in the implementation of the provisions of this Convention, including evaluation of scheduled and unscheduled chemicals.
39. The Technical Secretariat shall:
- (a) Negotiate agreements or arrangements relating to the implementation of verification activities with States Parties, subject to approval by the Executive Council;
- (b) Not later than 180 days after entry into force of this Convention, coordinate the establishment and maintenance of permanent stockpiles of emergency and humanitarian assistance by States Parties in accordance with Article X, paragraphs 7(b) and (c). The Technical Secretariat may inspect the items maintained for serviceability. Lists of items to be stockpiled shall be considered and approved by the Conference pursuant to paragraph 21(i) above;
- (c) Administer the voluntary fund referred to in Article X, compile declarations made by the States Parties and register, when requested, bilateral agreements concluded between States Parties or between a State Party and the Organization for the purposes of Article X.
40. The Technical Secretariat shall inform the Executive Council of any problem that has arisen with regard to the discharge of its functions, including doubts, ambiguities or uncertainties about compliance with this Convention that have come to its notice in the performance of its verification activities and that it has been unable to resolve or clarify through its consultations with the State Party concerned.
41. The Technical Secretariat shall comprise a Director-General, who shall be its head and chief administrative officer, inspectors and such scientific, technical and other personnel as may be required.
42. The Inspectorate shall be a unit of the Technical Secretariat and shall act under the supervision of the Director-General.
43. The Director-General shall be appointed by the Conference upon the recommendation of the Executive Council for a term of four years, renewable for one further term, but not thereafter.
44. The Director-General shall be responsible to the Conference and the Executive Council for the appointment of the staff and the organization and functioning of the Technical Secretariat. The paramount consideration in the employment of the staff and in the determination of the conditions of service shall be the necessity of securing the highest standards of efficiency, competence and integrity. Only citizens of States Parties shall serve as the Director-General, as inspectors or as other members of the professional and clerical staff. Due regard shall be paid to the importance of recruiting the staff on as wide a geographical basis as possible. Recruitment shall be guided by the principle that the staff shall be kept to a minimum necessary for the proper discharge of the responsibilities of the Technical Secretariat.
45. The Director-General shall be responsible for the organization and functioning of the Scientific Advisory Board referred to in paragraph 21(h). The Director-General shall, in consultation with States Parties, appoint members of the Scientific Advisory Board, who shall serve in their individual capacity. The members of the Board shall be appointed on the basis of their expertise in the particular scientific fields relevant to the implementation of this Convention. The Director-General may also, as appropriate, in consultation with members of the Board, establish temporary working groups of scientific experts to provide recommendations on specific issues. In regard to the above, States Parties may submit lists of experts to the Director-General.

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通訊

44. 視察員在整個國內停留期間應有權與技術秘書處總部通訊。為此，他們可使用經適當證明的自備的核准設備並可請求被視察締約國或所在締約國允許其使用其他電信手段。視察組應有權使用自備的雙向無線電通訊系統，供巡查周界的人員與視察組其他成員進行聯絡。

視察組和被視察締約國的權利

45. 根據本公約有關各條和附件以及設施協定和視察手冊所載的程序，視察組應有權不受阻撓地察看視察現場。所視察的項目由視察員選定。
46. 視察員應有權在被視察締約國代表在場的情況下詢問設施的任何人員，目的是確立有關事實。視察員只應要求提供進行視察所必需的資料和數據，被視察締約國應根據請求提供此類資料。被視察締約國若認為向設施人員提出的問題與視察無關，有權予以駁回。如果視察組組長對此有^(註)異議並陳述這些問題與視察的關係，應以書面方式將問題交給被視察締約國，請求作出答復。視察組可在其報告涉及被視察締約國合作情況的部分中記述拒絕批准詢問或允許回答問題的情況及任何解釋。
47. 視察員應有權檢查其認為與執行任務有關的文件和記錄。
48. 視察員應有權提出要求，由被視察締約國或被視察設施的代表代為拍攝照片。應有可能拍攝即顯照片。視察組應判定照片是否符合要求，若不符合，應重新拍攝照片。視察組和被視察締約國應各保留一份照片的複製件。
49. 被視察締約國代表應有權觀察視察組進行的所有核查活動。
50. 被視察締約國應有權在其提出請求後得到技術秘書處收集的關於其設施的資料和數據的副本。
51. 視察員應有權請求對視察中出現的可疑情況作出澄清。此種請求應立即通過被視察締約國代表提出。被視察締約國代表應在視察期間向視察組作出消除疑點可能需要的澄清。若涉及視察現場內某一物體或建築的問題未消除，則在提出請求的情況下，應拍攝該物體或建築的照片，以澄清其性質和功能。如果在視察期間無法消除疑點，視察員應立即通知技術秘書處。視察員應在視察報告中列出任何未解決的問題、有關的澄清以及所拍攝的任何照片的複製件。

樣品的採集、處理和分析

52. 被視察締約國代表或被視察設施代表應按視察組的要求在視察員的面前採集樣品。如果事先與被視察締約國代表或被視察設施代表商定，視察組可自行採集樣品。

Communications

44. Inspectors shall have the right throughout the in-country period to communicate with the Headquarters of the Technical Secretariat. For this purpose they may use their own, duly certified, approved equipment and may request that the inspected State Party or Host State Party provide them with access to other telecommunications. The inspection team shall have the right to use its own two-way system of radio communications between personnel patrolling the perimeter and other members of the inspection team.

Inspection team and inspected State Party rights

45. The inspection team shall, in accordance with the relevant Articles and Annexes of this Convention as well as with facility agreements and procedures set forth in the inspection manual, have the right to unimpeded access to the inspection site. The items to be inspected will be chosen by the inspectors.
46. Inspectors shall have the right to interview any facility personnel in the presence of representatives of the inspected State Party with the purpose of establishing relevant facts. Inspectors shall only request information and data which are necessary for the conduct of the inspection, and the inspected State Party shall furnish such information upon request. The inspected State Party shall have the right to object to questions posed to the facility personnel if those questions are deemed not relevant to the inspection. If the head of the inspection team objects and states their relevance, the questions shall be provided in writing to the inspected State Party for reply. The inspection team may note any refusal to permit interviews or to allow questions to be answered and any explanations given, in that part of the inspection report that deals with the cooperation of the inspected State Party.
47. Inspectors shall have the right to inspect documentation and records they deem relevant to the conduct of their mission.
48. Inspectors shall have the right to have photographs taken at their request by representatives of the inspected State Party or of the inspected facility. The capability to take instant development photographic prints shall be available. The inspection team shall determine whether photographs conform to those requested and, if not, repeat photographs shall be taken. The inspection team and the inspected State Party shall each retain one copy of every photograph.
49. The representatives of the inspected State Party shall have the right to observe all verification activities carried out by the inspection team.
50. The inspected State Party shall receive copies, at its request, of the information and data gathered about its facility(ies) by the Technical Secretariat.
51. Inspectors shall have the right to request clarifications in connection with ambiguities that arise during an inspection. Such requests shall be made promptly through the representative of the inspected State Party. The representative of the inspected State Party shall provide the inspection team, during the inspection, with such clarification as may be necessary to remove the ambiguity. If questions relating to an object or a building located within the inspection site are not resolved, the object or building shall, if requested, be photographed for the purpose of clarifying its nature and function. If the ambiguity cannot be removed during the inspection, the inspectors shall notify the Technical Secretariat immediately. The inspectors shall include in the inspection report any such unresolved question, relevant clarifications, and a copy of any photographs taken.

Collection, handling and analysis of samples

52. Representatives of the inspected State Party or of the inspected facility shall take samples at the request of the inspection team in the presence of inspectors. If so agreed in advance with the representatives of the inspected State Party or of the inspected facility, the inspection team may take samples itself.

第六部分

根據第六條進行的本公約不加禁止的活動

關於附表 1 化學品以及與此種化學品有關的設施的制度

A. 一般規定

1. 一締約國不得在各締約國領土以外的地方生產、獲取、保有或使用附表 1 化學品，而且不得將此種化學品移出其領土，除非轉讓給另一締約國。
2. 一締約國不得生產、獲取、保有、轉讓或使用附表 1 化學品，除非：
 - (a) 這些化學品用於研究、醫療、藥物或防護性目的；而且
 - (b) 化學品的種類和數量嚴格限於那些可證明需用於上述目的者；而且
 - (c) 在任何特定時間用於上述目的的化學品的合計數量等於或少於 1 噸；而且
 - (d) 一締約國在任一年內通過生產、從化學武器儲存中取出以及轉讓而得到的用於上述目的的合計數量等於或少於 1 噸。

B. 轉讓

3. 一締約國可將附表 1 化學品移出其領土，但只可轉讓給另一締約國，而且只能按照第 2 款的規定用於研究、醫療、藥物或防護性目的。
4. 轉讓的化學品不得再轉讓給第三國。
5. 在轉讓給另一締約國前至少 30 天，兩個締約國均應將進行轉讓一事通知技術秘書處。
6. 每一締約國每年應對上一年的轉讓作出詳細宣布。此一宣布應遲於上一年結束後 90 天提交，並應就轉讓的每一種附表 1 化學品列明以下資料：
 - (a) 化學名稱、結構式和化學文摘社登記號，如果已給定此一號碼；
 - (b) 從其他國家得到或向其他國家轉讓的數量。應列明每次轉讓的數量、接受國和目的。

C. 生產

生產的總原則

7. 每一締約國在根據第 8 至第 12 款進行生產時，應最優先地確保人民安全和保護環境。每一締約國應按照本國的安全和排放標準進行此種生產。

PART VI

ACTIVITIES NOT PROHIBITED UNDER THIS CONVENTION
IN ACCORDANCE WITH ARTICLE VIREGIME FOR SCHEDULE 1 CHEMICALS AND FACILITIES
RELATED TO SUCH CHEMICALS

A. GENERAL PROVISIONS

1. A State Party shall not produce, acquire, retain or use Schedule 1 chemicals outside the territories of States Parties and shall not transfer such chemicals outside its territory except to another State Party.
A State Party shall not produce, acquire, retain, transfer or use Schedule 1 chemicals unless:
 - (a) The chemicals are applied to research, medical, pharmaceutical or protective purposes; and
 - (b) The types and quantities of chemicals are strictly limited to those which can be justified for such purposes; and
 - (c) The aggregate amount of such chemicals at any given time for such purposes is equal to or less than 1 tonne; and...
 - (d) The aggregate amount for such purposes acquired by a State Party in any year through production, withdrawal from chemical weapons stocks and transfer is equal to or less than 1 tonne.

B. TRANSFERS

3. A State Party may transfer Schedule 1 chemicals outside its territory only to another State Party and only for research, medical, pharmaceutical or protective purposes in accordance with paragraph 2.
4. Chemicals transferred shall not be retransferred to a third State.
5. Not less than 30 days before any transfer to another State Party both States Parties shall notify the Technical Secretariat of the transfer.
6. Each State Party shall make a detailed annual declaration regarding transfers during the previous year. The declaration shall be submitted not later than 90 days after the end of that year and shall for each Schedule 1 chemical that has been transferred include the following information:
 - (a) The chemical name, structural formula and Chemical Abstracts Service registry number, if assigned;
 - (b) The quantity acquired from other States or transferred to other States Parties. For each transfer the quantity, recipient and purpose shall be included.

C. PRODUCTION

General principles for production

7. Each State Party, during production under paragraphs 8 to 12, shall assign the highest priority to ensuring the safety of people and to protecting the environment. Each State Party shall conduct such production in accordance with its national standards for safety and emissions.