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SWEDEN
PROPOSED SWEDISH LEGISLATION FOR THE IMPLEMENTATION OF
THE CHEMICAL WEAPONS CONVENTION

On 17 June, 1993, on the anniversary of the signature of the Geneva Protocol, Sweden deposited its instrument of ratification concerning the Chemical Weapons Convention (CWC) with the Secretary-General of the United Nations. Ratification was preceded by parliamentary approval of a Bill which contained an outline, although not fully developed provisions, of the legislation necessary to implement the CWC.

Sweden belongs to those countries whose legal systems require that international treaties be incorporated into domestic law by means of a legislative act in order to be applicable at a national level. Under the Constitution, a treaty requiring implementing legislation may not be ratified without parliamentary approval (chapter 1, Section 2 of the Instrument of Government).

A government report containing proposals for the full legislative package has been examined by governmental and non-governmental authorities (DS 1993:50 Sveriges tillträde till Förenta nationernas konvention om förbud mot utveckling, produktion, innehav och användning av kemiska vapen samt deras förstöring. Lagstiftningsdel.) This paper contains a summary of the proposals submitted by the Government in that report. Final proposals for legislation will be submitted to the Riksdag in December. Ratification based on an outline of necessary legislation rather than on a final proposal is a novel procedure in Sweden. In this instance, the analysis of the areas and basic structure of legislation needed to implement the Convention was considered sufficient basis for ratification.

While some countries as far as possible implement arms limitation agreements in a single piece of legislation, Sweden generally tries to implement such agreements by infusing their requirements into existing legislation. This was the case with regard to the Biological Weapons Convention (BWC), which is implemented through existing legislation concerning export control of military equipment and products which can be used for purposes of mass destruction. No specific legislation relates to the BWC. This legislative method was also used to implement the non-proliferation Treaty. The same approach has been chosen for the implementation of the CWC, with a view to putting to use existing control mechanisms, rather than creating new ones.

* This document is based on a paper which was presented at the UNIDIP Symposium on Prohibition of Chemical Weapons held in Geneva, 1993.

The Chemical Weapons Convention specifically states that the material prohibition of the production, development, possession and use of chemical weapons must be infused into national legislation. The obligations of States parties in this regard are outlined in Article VII, which lays down the obligation for States to extend to natural and legal persons within their jurisdiction the prohibitions contained in the Convention. Penal legislation shall be extended to nationals wherever they may be. In Sweden, as in many other countries, existing legislative contrariness on the chemical industry and on arms production largely cover the obligations resulting from the treaty. Some amendments are necessary, however, particularly criminalising acts prohibited by the Convention. Legislative measures will also have to provide for implementation of the practical side of the verification process. Thus, there must be procedures for the collection of data necessary for declarations under the Convention, and for the realisation of inspections within the time frames required.

Legislation implementing the material provisions of the CWC

The implementation of the prohibition of the production, development, possession and use of chemical weapons, and in particular the rules relating to the chemicals and precursors listed in the Annex on Chemicals, will require an extension of the Penal Code, and will in all probability require modifications to existing arms control and chemical legislation. By fitting the acts prohibited by the Convention into this legislative structure, existing control mechanisms may be put to use. In order to benefit from the national enforcement measures already in place, the three lists of chemicals in the Annex will be treated differently. The existing legislation affected by the implementation of the Convention is, in addition to the Penal Code, the legislation concerning war materiel (the Act and Ordinance concerning Military Equipment (MEA), lagen (1992:1300) om förbud mot utförelse av krigsmateriel), products which can be used for mass destruction purposes (Act prohibiting the export of Products which can be used for mass destruction purposes (MDA), lagen (1991:341) om förbud mot utförelse av vissa projektor som kan användas i massförstörelsesyfte, m.m.), and the Act on Chemical products (lagen (1985:426) om kemiska projektor).

Under the Swedish proposal, the provision of the Penal Code which concerns violations of treaties pertaining to international humanitarian law will be extended to include acts in violation of the CWC. Acts in grave breach of the 1925 Geneva Protocol are already prohibited under this provision, which thus encompasses some acts prohibited by the CWC. In order to expressly include breaches of the CWC which are not already criminal, an additional section has been proposed, prohibiting other acts in breach of this Convention.

Furthermore, unlawful acts relating to chemical weapons will be added to those crimes, including hijacking and sabotage, for which Swedish courts have jurisdiction abroad. When jurisdiction is extended in this way, no limitation is made with respect to nationality. The Penal Code will thus extend the application of the prohibition of acts in breach of the CWC to any place where a violation is committed, irrespective of the nationality of the perpetrator and irrespective of whether the act is prohibited under the law of the state in which it was committed. Minor breaches of the Convention are excepted from the provision of the Penal Code, although they may of course fall foul of export control legislation, in particular concerning the smuggling of goods.

The material obligations of the CWC largely fall within the ambit of Swedish export control legislation. The purpose of the Act and Ordinance concerning Military Equipment is to regulate the production and spreading of Swedish war materiel. The Act contains a number of provisions prohibiting i.a. the export of war materiel from Sweden. The Ordinance contains a list of products to be considered war materiel. Chemical weapons fall within the definition of war materiel covered by this legislation. Upon application, the Government may grant exceptions from the blanket prohibitions by means of licences. A licence is granted pursuant to a Government decision. A list such as that contained in the Ordinance can never be entirely comprehensive. The final decision as to whether a product constitutes war materiel lies with the Government when granting a licence.

An application to produce war materiel should include information on the type of materiel, as well as the location and ownership of the company involved. Licences are also required in order to sell or supply war materiel, a rule which thus also applies to Sash intermediaries between foreign buyers and sellers. The travaux properties Contain a number of unconditional restrictions on exports. Export is prohibited i.a. if it would be contrary to an international treaty to which Sweden is a party.

Activities not prohibited by the convention are regulated in Article VI and the Verification Annex, which provide detailed rules relating to uses and ways of handling toxic chemicals which are permissible. In this context, parties undertake to submit to a wide range of verification measures, of varying degrees of intrusiveness, depending on the clarification of the chemical. This is the area where the effects on chemical industry will be most apparent.

The most comprehensive limitations on the permissible use of chemicals relate to the chemicals listed in Schedule 1. The Convention imposes considerably stricter restrictions on the handling of these chemicals than on those on Schedules 2 and 3. Transfer of Schedule 1 chemicals is only permissible to other States parties. Re transfer to third States is prohibited. Further restrictions concern the quantities of such chemicals which may be produced, limited to specified purposes. States are under an obligation to ensure that the exclusivity of the permissible purposes is respected.

In Sweden, the obligation not to export Schedule 1 chemicals other than to States parties, and then only for pharmaceutical, medical, research or protective purposes can be met within the framework of the MEA. Export of such chemicals without a licence would be an offence under existing legislation concerning the smuggling of goods (see Law (1960:418) on Penalties for the Smuggling of Goods). The routine requirement of end use certificates under Swedish law also satisfies the requirements of the Convention in this regard. Swedish export control legislation contains penal sanctions for entities exporting such products despite knowledge that an end use certificate contains incorrect information.

The CWC requires that the Technical Secretariat be informed not more than thirty days after export. It should be enough for Government to specify that the licence takes effect thirty days after it was issued in order for this information to be submitted on time

With certain strictly limited exceptions, States parties may produce schedule 1 chemicals only at a single small scale facility. The limitation of such production to one facility falls within the discretion of the Government to grant licences. At present, these chemicals are only produced for protective purposes at one facility in Sweden, the National Defence Research Establishment (FOA). AS a governmental agency, FOA is not subject to the rules of the MEA. However, being a governmental agency, it is already subject to government control fulfilling the requirements of the Convention. Should another facility be designated single small-scale facility under the Convention, the MEA's provisions on licensing would be applicable to production there. One issue currently under discussion is whether there is a need for legislation preventing a single small scale facility from exploiting its monopoly.

Under Part VI, C, paragraph 12, synthesis of Schedule 1 chemicals is permissible under very limited circumstances at other facilities. Under existing legislation, no such exception applies. The MEA will therefore have to be amended to allow the Government to grant a general exemption for pharmaceutical, medical and research purposes.

According to Part VII, C of the Verification Annex, Schedule 2 chemicals may only be exported to other CWC Parties. In the interim until this obligation takes effect an end use certificate shall be required for transfers to non parties. Conversely, Schedule 2 chemicals may only be received from other States parties. With regard to the chemicals in Schedule 3, the Convention requires States parties to ensure that the chemicals are used exclusively for purposes not prohibited by the Convention. Thus, a party wishing to transfer such chemicals to a non party must i.a. require a commitment from the recipient that they not be arrived or transferred in turn in a way contrary to these provisions. .

The chemicals listed in schedule 2 are dual use chemicals. Under Swedish law, such chemicals are not classifiable as war materiel unless their purpose is to be used as such. Control of chemicals of dual use character is at present governed by the 1991 Act prohibiting the export of products which can be used for mass destruction purposes (MDA). An Ordinance lays down which products fall within the ambit of the Act. products within the sphere of the Act are i.a. products and technology regulated by the MTCR (Missile Technology Control regime) and the NSG (Nuclear Suppliers Group), as well as chemical and biological precursors. Some chemicals mentioned in the CWC need to be added to the list in the Ordinance by Government decision. This will not, however, require new legislation.

The Act is based on a general prohibition of export without a Government licence. A licence may be conditional. A breach of the Act or of conditions set in a licence may result in the withdrawal of the licence itself. The MDA also covers the CWC's requirement of an end use certificate for export.

The prohibition of import of Schedule 2 chemicals from a country not party to the Convention, (Part VII) is not, however, covered by existing legislation. There is no need to prohibit import of any of the other products to which the MDA applies. Hence, adding a separate mechanism under the MDA regulating and controlling imports, specifically for chemical weapons purposes was deemed irrational. Instead, an

existing structure regulating the import of dangerous chemicals in the Act on Chemical Products (CPA) will probably be expanded to accommodate the requirements of the Convention. Import permits for dangerous chemicals are issued by the provincial councils. The present scope of the CPA is restricted to the prevention of damage to health and the environment caused by inherent qualities of chemical products. The inclusion of the fulfilment of international treaty obligations in the provision outlining the aims of the CPA would allow for the implementation of existing control mechanisms with respect to Schedule 2 chemicals.

Like Schedule 2 chemicals, the seventeen chemicals listed in Schedule 3 are dual-use products, which fall within the scope of the MDA. No additional legislation is foreseen with respect to the obligations regarding these chemicals. It is enough for the Government to add those six chemicals not already enumerated in the annex to the Ordinance prohibiting the export of products which can be used for mass destruction Purposes for the MDA control mechanism to apply. Therefore, no new legislation is needed in this regard.

Verification under the CWC

The system of verification established under the CWC comprises both the establishment of an international organisation charged with supervisory responsibility, and the implementation of the prohibitions and verification procedures in national legislation. The structure of the verification system is based on declarations by States parties and on the establishment on a wide reaching inspection regime. The challenge to national legislators is that of accommodating both the routine and the exceptional in this system: to provide the domestic structure necessary for regular declarations and inspections as well as flexible structures for the facilitation of challenge inspections.

The ramifications of the verification procedures for the private chemical industry are unprecedented. From a national point of view, the implementation of the convention in relation to private entities will prove the most difficult part of the legislative process. Clearly, implementing the information and inspection provisions of the CWC will require far reaching legislation, largely because of the wide set of actors affected by the regime.

An important part of the verification system set up by the CWC is based on the submission by States Parties of declarations concerning the implementation of its provisions. Declarations are required under Article III concerning i.a. possession of chemical weapons, the transfer or receipt of such weapons since 1946, the destruction of chemical weapons, as well as regarding chemical weapon production facilities and plans for their conversion. Sweden does not possess such weapons. The control of the chemical industry and the permissible handling of toxic chemicals is also subject to wide reaching declaration obligations.

As was the case with the material provisions concerning activities prohibited by the CWC, the declaration requirements of the Convention can largely be fitted into existing control mechanisms in Sweden. With respect to Schedule 1 chemicals, the submission of information necessary for notifications of the transfer of such chemicals, and for declarations concerning facilities can be required under existing

law. For instance, the MEA already includes a requirement of declarations from licensees. In implementing this legislation, it will be crucial that the very narrow time scale allowed in the CWC be taken into account. The duty to notify the Technical secretariat 180 days in advance of planned changes in relation to the initial declaration, will lead to a change in the MEA. Current provisions only provide for the submission of declarations concerning changes made within a month after the change has taken place.

Declarations concerning the single small scale facility will either be able to be based on the general principles granting Government control over the activities of governmental agencies, or on Section 20 of the MEA, which provides for Governmental control over licentious. In granting a licence to a single small scale facility, Government can lay down requirements concerning the submission of the information necessary for declarations to the Technical Secretariat.

The need for information for initial and annual declarations regarding Schedule 2 and 3 chemicals can also be met under the control mechanisms for chemical products constituting health or environmental hazards under the CPA, subject to a minor adjustment to the scope of the provision (Sect. 9) requiring declarations. Declarations must be submitted to the National Chemicals Inspectorate. More detailed rules on the content of declarations must be inserted into the Ordinance on Chemical Products. These rules will have to enter into force well before the entry into force of the CWC in order to pave the way for initial declarations. The CPA already includes the possibility of fining a licensee who fails to provide info required by the Government.

The ultimate enforcement of the CWC is to be ensured by its comprehensive scheme of inspections. As with the provisions regarding declaration obligations, the implementation of the provisions regarding inspections requires legislative mechanisms to enforce the provisions on the objects of an inspection, be they private companies, individuals or governmental agencies.

Once the site of an inspection has been defined, inspection teams shall be allowed full access to the site. They have the right to interview staff, study documents and papers, request that photos be taken and take samples. Challenge inspections shall also include the control of all vehicles leaving all exit points, first by the inspected state itself, then by the inspection teams upon arrival.

The time frame laid down in the verification provisions requires that enacted legislation function expeditiously. The first declarations are due 30 days after the entry into force of the CWC, arguably in February 1995. A challenge inspection can take place upon as little as 12 hours notice from the Director General to the inspected party (verification Annex, Part X, para. 10.)

The potential consequences of these provisions for governmental agencies, industry and individuals are considerable. In as much as individuals are concerned, legislation will also have consequences for basic civil rights. Under the Swedish Constitution, (Chapter 8, Section 3 of the Instrument of Government), provisions interfering with the personal or economic affairs of private subjects shall be laid down by law. This is clearly the case with respect to the verification provisions of the CWC. The formal decision by the Government to permit an inspection in each case, and to designate a governmental authority to assist the inspection team, must therefore be based on an

Act adopted by the Riksdag. The Government proposal therefore entails the promulgation of a special Inspections Act. The delegation of powers to the Government under this Act adds an important element of flexibility to the process, while ensuring constitutional protection of sail rights. It is also worth noting that the right of decision regarding an inspection under the proposed Swedish Inspections Act lies with the executive.

For each inspection, Government is to designate a governmental agency entrusted with decision making powers on issues related to the functioning of the inspection. Both individual entities affected by an inspection and inspection teams should be allowed to refer an issue relating to the inspection directly to Government.

An issue raised when elaborating the implementation of the legislation concerned with the verification procedures, was how the decision-making structure of Swedish society could be adapted to the rigorous time constraints of a challenge inspection. The Inspections Act is intended to provide the legal framework to enforce compliance with the verification procedures. However, in view of the fact that numerous decisions will need to be taken quickly on an ad hoc basis during an inspection, even at a governmental level, the Inspections Act leaves the field open for more detailed regulations by means of Government ordinances.

The proposed Swedish CWC Inspections Act contains an outline of the chief elements in an inspection (access to any site under Swedish jurisdiction, control of goods traffic from the site, the taking of samples, the use of instruments and technical apparatus). The only eventuality provided for in the CWC, but excluded from the framework of the Act, is that it does not include the right to enter the home of a private individual. Should a challenge inspection be directed against a home, other legal means, i.e. within the criminal legal system (such an event would in all probability entail the suspicion of a breach of Swedish law) could be used to enable the inspection to take place .

Recognising that personnel of the inspected facilities may be bound by contract to maintain confidentiality with respect to information gained through their position, the act includes a specific exception from such confidentiality. The obligation to answer questions from the inspection team would prevail in a case of conflict of interests.

Ensuring the co-operation of persons affected by inspections is of great importance to the effective implementation of the Kayak verification regime. Under the proposed Inspections Act, those to be inspected must be heard before the inspection takes place, if such consultations are at all possible in the time frame available, and there are no special reasons to the contrary. In order to be able to fulfil the obligations under the Convention, it must equally be possible to conduct an inspection without the co-operation of the facility and its staff, and in fact despite their active opposition. The government or a designated governmental agency will therefore be entitled to request police assistance for the effective realisation of the inspection.

Privileges and immunities

As a complement to national legislation regarding the conduct of inspections, separate legislation is needed to provide the privileges and immunities granted to inspection teams and observers under the Convention. The existing provisions outlining the

privileges and immunities of the inspection teams and observers are to be supplemented by further agreements between States Parties and the Organisation.

To a great extent, inspection teams are accorded the same privileges and immunities accorded to diplomats under the 1961 Vienna Convention on Diplomatic Relations. An obligation to grant inviolability not only to the persons of the teams and observers, but also to their living quarters, office premises, papers and samples, requires incorporating legislation in Sweden, as does the obligation to grant a general exemption from taxes and duties.

These obligations will be incorporated into the corpus of Swedish law by means of an amendment to the 1976 Act on Immunity and Privileges in Certain Cases. Normally, obligations concerning privileges and immunities are implemented by the simple addition of the name of the agreement in question to the list contained in the annex to the Act of the relevant organs and persons accorded privileges under each mentioned agreement. The provisions concerning privileges and immunities in these agreements then become part of Swedish law in themselves.

As a legislative technique, the incorporation of new agreements in this way is flexible, and not unduly cumbersome. However, because the treaty provisions themselves become Swedish law, unless these provisions achieve a certain level of precision, the legislation becomes obscure and difficult to apply. On balance, however, incorporation has been seen as the only reasonable way to implement the numerous agreements to which Sweden is a party, providing for privileges and immunities.

Confidentiality

A fundamental basis for the exchange of information under the CWC is that confidentiality accorded by the provider of certain information be respected. One important question raised during the elaboration of the Swedish legislative package, was that of how to ensure that confidentiality is respected in cases where Swedish confidentiality legislation sets a different standard than that of the provider of information.

In preparation for the Agreement on the European Economic Area, the introduction of a new provision in the The secrecy Act has been proposed, which will enter into force at the same time as the EEA Agreement. The Government has also proposed that this provision be applied in order to implement the CWC. The new subsection of Chapter 8, Section 6 states that confidentiality with respect to information concerning the personal or economic affairs of individuals shall be subject to the provisions of treaties ratified by Parliament. Provided this provision enters into force, it could be applied to information exchanged under the CWC.

In addition to this provision, it is possible that information transmitted to Government within the framework of the CWC might also be protected by Chapter 2, Section 1 of the Secrecy Act, concerning the protection of information relating to Sweden's relations to other countries or to international organisations. This area of law is under review, and is therefore not studied in substance in the government proposal

National Authority

The designation of a national authority as a focal point for interaction between the Technical Secretariat of the Organisation for the Prohibition of chemical Weapons (OPCW) and the State Party has caused much discussion. Clearly the key here is between setting up a new entity for this purpose and designating an existing authority which will liaise with other relevant organs. Sweden plans to designate the Ministry for Foreign Affairs. Given that the role actually assigned to the authority under the Convention is that of co-ordinator rather than executor, there did not seem to be a need for a new separate body.