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A Comparative Study of the Legal Implementation of the Chemical Weapons Convention in Foreign Jurisdictions

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13. ABSTRACT (Maximum 200 words) State Parties will implement the Chemical Weapons Convention (CWC) according to their respective constitutions, statutes, and procedures. This report presents an overview of the distinctive legal features relevant to CWC implementation in potential State Parties. The Organization for the Prohibition of Chemical Weapons is authorized to enter any State Party's territory on short notice. While the Organization must carry out inspections unintrusively and respect national constitutional rights, these inspections may be undertaken without prior judicial authorization and may not be refused. Inspection activities may include personnel interviews, examination of facility operations and records, and sampling of materials. These obligations raise unique legal issues that must be resolved to assure consistent CWC implementation among State Parties. This report comparatively analyzes the relevant law of 18 foreign States and 3 international human rights systems. Scholars from each of these jurisdictions were asked to respond to questionnaires designed to elicit a uniform basis for evaluating CWC implementation under each domestic legal system. Their individual answers are summarized here and are available in their entirety. While the CWC's verification measures provoke unprecedented legal issues, successful implementation throughout the world community is entirely possible.				
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EXECUTIVE SUMMARY

State Parties will implement the Chemical Weapons Convention (CWC) according to their respective constitutions, statutes, and procedures. Analysis is required of each State Party's laws and administrative practices to determine the effects and limitations of CWC enforcement. This Report presents an overview of the distinctive legal features relevant to CWC implementation in potential State Parties. Its purpose is to identify possible problem areas and suggest modifications to the CWC that will help ensure its success.

This Report is imperative due to the CWC's novel regime of on-site inspections of private facilities. The Organization for the Prohibition of Chemical Weapons is authorized to enter any State Party's territory on short notice. While the Organization must carry out inspections unintrusively and respect national constitutional rights, these inspections may be undertaken without prior judicial authorization and may not be refused. Inspection activities may include personnel interviews, examination of facility operations and records, and sampling of materials. The CWC obliges State Parties to compel compliance with its provisions and to penalize violators. These obligations raise unique legal issues that must be resolved to assure consistent CWC implementation among State Parties.

This Report comparatively analyzes the relevant law of eighteen foreign States and three international human rights systems. Scholars from each of these jurisdictions were asked to respond to questionnaires designed to elicit a uniform basis for evaluating CWC implementation under each domestic legal system. A list of the countries and human rights systems surveyed and the names of the individual reporters can be found in Appendix C. Their individual answers are summarized here and are available in their entirety.

The process of ratifying the CWC differs among State Parties. Yet in each country, the CWC's inspection provisions will require or will be facilitated by the enactment of implementing legislation. This analysis did not identify any inherent constitutional impediments to effective implementation of the CWC. However, some national reporters identified situations where the legislature or the courts in their State could interfere with or misinterpret the treaty. Potential implementation problems can be avoided by specifying the requirements for national implementing legislation in the CWC. In particular, Article VII should create a duty to enact implementing legislation diligently within a specified time period.

The position of the CWC in the "hierarchy of legal norms" within each State Party will vary among nations. Once ratified, the CWC will be subordinate to most national constitutions. Generally, a treaty is superior to statutory law, but in a number of states, treaties rank equal to or even below national legislation. Thus, the CWC must be in harmony with the domestic constitutions and other legal requirements of nearly every potential State Party.

Every national reporter agreed that CWC on-site inspections will constitute "state action" by an inspected State Party. Thus, inspection activities conducted by the Organization will

trigger constitutional protections against undue governmental infringement of rights and liberties. The same legal limitations that apply to national government powers to interfere with individual and commercial rights may therefore restrict CWC inspections.

Considerable variation exists among nations as to the scope of judicial authority to review treaties. Some nations provide for constitutional review of a treaty prior to its ratification, some provide for review only after ratification, while others forbid review of treaties altogether. Nations that permit post-ratification review fall into two broad categories: those that allow legal challenges to a treaty's overall constitutionality and those that sanction only claims of a specific constitutional violation. In nearly every nation that allows constitutional challenges to a treaty, judicial review could interfere with domestic implementation of the CWC if its enforcement would violate constitutional rights.

Nearly every state and international system surveyed explicitly guarantees a right to personal privacy and protects against unlawful government intrusion into homes. Generally, a state can compel searches of homes to enforce criminal laws if a judge issues a search warrant or its equivalent or if "exigent circumstances" make the process of obtaining permission self-defeating. Even with judicial permission, many nations restrict the hours when searches of homes may occur, and in some nations the owner or occupier must be present if possible. Searches of homes pursuant to the CWC could prove to be constitutionally problematic in many State Parties. In some nations, the protections of the home extend to hotel rooms and places of work. Therefore, the CWC should be amended to contain a provision which defines homes and exempts places so defined from all types of CWC inspection.

Nations vary in the extent to which government and commercial facilities are accorded a right of privacy. In most nations, searches to enforce regulations on operating businesses are "administrative" rather than "judicial." Commercial enterprises are accorded rights through the regulatory process, usually with limitations and generally not including those rights which only humans can enjoy. Judge-issued search warrants are usually unnecessary for administrative searches of commercial property, although many states require prior approval by at least an administrative agency. Inspections may be conducted at any time, and inspectors generally have unfettered discretion in the scope and manner of searches. Thus, legal challenges to CWC inspections of commercial property will probably be unsuccessful, provided that the domestic legal implications of such inspections are administrative, not penal. The CWC should be amended to clarify that inspections will lead to penal consequences only for violations of Article 1.

In nearly every nation surveyed, the government may not take private property without providing due process and compensation to owners. Many nations recognize trade secrets as a form of property, and those which do not provide alternative protections. In some countries, the state may be liable for civil damages if it unduly discloses trade secrets; others provide for criminal punishment of the discloser. Only a few countries will allow the courts to prevent an inspection due to the possibility that a trade secret may be disclosed. Thus, if the CWC's protections of confidential information fail to prevent disclosure of a trade secret,

the inspected State Party may be liable for damages to the owner. However, it is unlikely that inspections will be restricted by that nation's legal system.

Due process protections vary greatly among the nations studied. Most countries have either a constitutional or statutory right against self-incrimination. The countries are divided as to whether immunity from prosecution may be granted in order to coerce self-incriminating testimony. In most nations, evidence discovered during an "administrative" inspection may be used in a subsequent criminal prosecution. Consequently, in most nations, information learned during CWC inspections could later be used to prosecute violations of the CWC-required domestic penal law.

Ultimately, the CWC presages a new foundation for international security based neither on fear nor on trust, but on regulation by a legal regime. Every step taken to increase that regime's effectiveness necessarily intrudes upon individual freedom in those states that enter the treaty. While the CWC's verification measures provoke unprecedented legal issues, successful implementation throughout the world community is entirely possible. The CWC's ambitious goal of ridding the world of the scourge of chemical weapons can proceed effectively with due respect to basic freedoms and rights.

Table S-1. Summary table classifying the majority responses of legal system surveyed and significant exceptions.

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
	<i>Authority To Ratify Treaties</i>	
2.2.1	(1) Every nation vests authority to negotiate and sign treaties in an authorized Executive agent.	
2.2.1	(2) Most nations require legislative action to make a treaty binding domestically. In a few nations, no legislative action is necessary.	Brazil, Mexico, Russia, Israel, Czech, Germany China, Morocco
	<i>Reservations</i>	
2.2.2	(3) In most countries, the legislature may make reservations to a signed treaty.	Iran, Germany
	<i>Treaties in the Hierarchy of National law</i>	
2.2.3	(4) Most nations follow the doctrine of dualism: a ratified treaty is not part of domestic law until domestic legislation incorporates it.	Hungary, Germany
2.2.3	(5) A few nations apply the monistic doctrine: a ratified treaty has immediate domestic force.	France
2.2.3	(6) In most countries, treaties occupy a status between the constitution and statutes.	Russia, Greece Morocco, China, Czechoslovakia
2.2.3	(7) In some countries, treaties are not superior to domestic statutory law.	Iran, Brazil, Germany, Turkey, Chile, Israel
	<i>Need for Implementing Legislation</i>	
2.2.4	(8) CWC implementing legislation will be essential in all nations, and most reporters recommend expansive legislation.	Morocco, Russia
2.2.4	(9) In some countries, the more a treaty affects citizens' rights, the greater the need for implementing legislation.	Mexico, Iran, U.K., Germany

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
	<p><i>Judicial Review of Treaty Constitutionality</i></p>	
2.3.1	(10) Some countries forbid judicial scrutiny of ratified treaties on the grounds of separation of powers and deference to the non-judicial branches of government as to foreign affairs.	Morocco, Iran, China, Japan, Czechoslovakia
2.3.1	(11) Some nations preclude a direct challenge to a treaty, but a request for a declaration may justify review.	Israel, U.K.
2.3.2.1	(12) A few national legal systems provide for judicial review of a signed convention prior to its ratification.	Russia, Hungary, France, Chile
2.3.2.2	(13) Some countries permit both a challenge to a treaty's constitutionality and a suit to prevent inspections that would violate a person's constitutional rights.	Chile, Egypt, Germany
2.3.2.2	(14) In many countries, a suit can challenge a treaty's implementation as unconstitutional.	Italy, Mexico, France, Brazil, Greece, Turkey
2.3.2.2	(15) In a few countries, a treaty may be challenged only if a statute so provides.	Russia, India
	<p><i>CWC Inspections as "State Action"</i></p> <p>In every nation, CWC inspections will constitute "state action," because:</p>	
2.4	(16) National authorities will permit CWC inspections making them equivalent to other government regulatory efforts;	Chile, Turkey
2.4	(17) The host country's agents will actively participate in CWC inspections;	Egypt, Hungary
2.4	(18) General principles of territorial supremacy and sovereignty give the government exclusive authority to permit inspections;	Czechoslovakia, Germany
2.4	(18) Chemical weapons are under the exclusive control and regulation of the government;	Brazil
2.4	(19) The inspected State Party must pursue enforcement measures upon discovery of a CWC violation.	Israel

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
	<i>Protection of The Right of Personal Privacy</i>	
3.2	(21) The right to personal privacy is universally respected.	ECHR, IACHR, U.N. Norms
3.2.1	(22) Nearly all countries constitutionally protect privacy.	Greece, Russia, Brazil, Japan, Germany
3.2.1	(23) A few countries protect the right to privacy in the absence of a constitutional provision.	U.K.
3.2.1	(24) Some countries restrict the constitutional right to privacy for limited, specified reasons.	Turkey
	<i>Personal Privacy and Biomedical Testing</i>	
3.2.2	(25) Some nations permit biomedical searches.	Morocco,
3.2.2	(26) Some nations allow biomedical testing but only in specified contexts or under established procedures.	U.K., Czechoslovakia, Germany, Iran, Chile
3.2.2	(27) Some nations prohibit compelled biomedical testing.	Russia, Greece, Brazil
	<i>Special Protection for the Privacy of Homes</i>	
3.3.1.1	(28) The sanctity of the home is universally recognized.	ECHR
3.3.1.2	(29) Nearly every country's constitution or common law protects the inviolability of the home.	Egypt, Japan, U.K.
3.3.1.2	(30) While the definition of a home varies, most countries extend the privacy protection beyond a residence.	Greece, Iran, Morocco, Czechoslovakia

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
	<i>Authorization of Searches of Homes</i>	
3.3.2	(31) A few countries explicitly specify the required justifications for a home search. But in some countries, authority is not specified.	Israel, Brazil, U.K., Germany, Czechoslovakia
3.3.2	(32) In many countries, written authorization is required, but not necessarily from a judicial authority.	Hungary, Russia, Japan, Iran
3.3.2	(33) In some countries, statutory exceptions (e.g. reasonable cause) consume any warrant requirement.	Turkey, Italy, Morocco, Egypt
3.3.2	(34) In some countries, administrative authorities may search private homes for public interest purposes.	Chile, Mexico, Iran, Germany
	<i>Restrictive Conditions on Home Searches</i>	
3.3.3.1	(35) Many countries require the presence of the owner, the possessor, or a representative.	Hungary, Morocco, Czechoslovakia, Iran, Brazil, Turkey
3.3.2.2	(36) In many countries, searches of homes must be conducted during particular hours.	Morocco, Iran, Russia, Turkey, Brazil, France
3.3.2.2	(37) A few nations limit what may be searched in a home.	Mexico, Germany
3.3.2.3	(38) In some countries, forced entry is permitted in the event the home owner denies access.	Brazil, Iran, Czechoslovakia
	<i>Waiver of Rights</i>	
3.3.4	(39) In most countries, individuals can waive most of their rights, especially property rights.	Chile, Iran, Mexico, Germany
3.3.4	(40) In many countries, the right against unlawful search and seizure can be waived only by express acquiescence under limited circumstances.	Greece, Brazil, U.K., Hungary
3.3.4	(41) In all nations, the procedure for waiver must demonstrate voluntariness.	Nearly all surveyed nations
3.3.4	(42) In some countries, however, no formal process or requirement exists for waiver.	India, Israel, Chile, Egypt, Turkey

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
<i>Extension of Privacy Rights To Legal Entities</i>		
3.4.1	(43) Most countries regard commercial entities as "legal persons" for purposes of applying constitutional rights, which entitles them to the law's protections.	Nearly all surveyed nations
3.4.1	(44) Because commercial entities are state regulated, the rights to which they are entitled are limited to those that are not inherently personal in nature.	Greece, Israel, Iran, U.K., Mexico, Germany
3.4.1	(45) A few countries grant extremely few rights to commercial entities.	India, Italy
3.4.1	(46) In only a few nations do government facilities share constitutional rights with individuals.	Morocco, Iran, Brazil, Japan
3.4.1	(47) In a few other nations, state-owned facilities enjoy some rights, those rights are not personal in nature.	Czechoslovakia, Chile, Mexico, U.K.
<i>Establishment of Separate Administrative Courts</i>		
3.4.2	(48) Many countries distinguish "administrative" from "penal or judicial" inspections.	France, Morocco, Germany
3.4.2	(49) Where this distinction is recognized, administrative inspections are less restricted and must satisfy fewer prerequisites. Criminal inspectors have more intrusive powers.	Mexico, Italy, Brazil, Czechoslovakia, Egypt, Hungary, Chile, Russia
<i>Justifications for Administrative Inspections</i>		
3.4.3	(50) The most common reason for administrative inspections is to protect public health.	Nearly all nations surveyed
3.4.3	(51) Industries that pollute the environment are widely subject to regulation and inspection.	Russia, India, Mexico, U.K., Germany
3.4.3	(52) Some countries inspect industries trading in controlled substances, radioactive materials, pharmaceuticals, and hazardous wastes.	Brazil, Chile, Japan
3.4.3	(53) Industries related to arms production and defense may be subject to inspections.	Czechoslovakia, Iran, Italy, U.K., Israel, Turkey

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
	<i>Legal Authorization for Administrative Inspections</i>	
3.4.4	(54) Most states enact statutes empowering an agency to conduct administrative inspections.	Greece, Turkey, Italy, Japan, U. K., France, Mexico
3.4.4	(55) In most countries, regulatory statutes specify procedures that inspectors must observe in conducting authorized activities.	Greece, Morocco, Italy, Egypt, Japan, Germany, Czechoslovakia
3.4.4	(56) In some states, legislation authorizing inspections can restrict constitutional rights.	Chile, Israel, U.K.
3.4.4	(57) Some countries require less oversight of administrative agencies.	Brazil, China,
	<i>Timing and Frequency of Inspections</i>	
3.4.5.1	(58) In most of the countries surveyed, administrative officials determine the frequency of inspections.	France, Egypt, U.K., Germany, Morocco,
3.4.5.1	(59) In many countries, inspections may be conducted at almost any time.	Greece, China, Italy, Turkey
	<i>Warrant/Notice Requirements for Inspections of Facilities</i>	
3.4.5.2	(60) In many countries, an inspection can proceed with a warrant or order issued by an administrator.	France, Russia, India, Czechoslovakia, Morocco, Mexico
3.4.5.2	(61) In some countries, a warrant is required in limited circumstances, or is generally required but subject to numerous exceptions.	Egypt, Israel, Japan, U.K.
3.4.5.2	(62) In some countries no warrant is required so long as the object of the search is notified in advance.	Chile, Turkey, Hungary
3.4.5.2	(63) In some countries, a warrant is not ordinarily necessary to conduct an administrative inspection.	China, Iran, Greece, Germany

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
	<i>Proper Procedures for Carrying Out Inspections</i>	
3.4.6.1	(64) In most countries, inspections must be supervised by public officials or judicial personnel.	Egypt, Greece, France, Hungary, Chile, Brazil
3.4.6.2	(65) In many countries, inspectors are authorized to question personnel during an inspection.	Czech., Greece, Japan, Germany, Hungary
3.4.6.3	(66) In many countries, documents, books and records can be inspected during an administrative inspection.	Hungary, Japan, Italy, Russia, Czech.
3.4.6.4	(67) In some countries, certain areas of a facility are considered "private" and not subject to inspection.	Egypt, Iran, Morocco
3.4.6.5	(68) In most countries, the items that may legitimately be seized are defined by the scope of the search.	Morocco, Japan, France, Germany
3.4.6.6	(69) In many countries, refusal to cooperate with an inspection can carry civil or criminal penalties.	Turkey, Egypt, Czech., Mexico, Japan
	<i>Right To Challenge the Constitutionality of Inspections</i>	
3.5	(70) In most countries, courts can review administrative actions either on constitutional or procedural bases.	Czech., Chile, Russia, China, Germany
3.5.1	(71) In some countries, an injunction may be issued to prevent an administrative inspection. In other countries, injunctions are unavailable.	Israel, Chile, Japan, France China, India, Russia, U. K.
3.5.1	(72) Some nations recognize a right to an injunction, but enjoining a CWC inspection would be impractical.	Czechoslovakia, Turkey, Iran, Hungary

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
	<p><i>Liability for Improper Inspections</i></p>	
3.5.2.1	(73) In some countries, individual inspectors may be held either criminally or civilly liable for violating inspection procedures.	Chile, Turkey, Iran
3.5.2.2	(74) Nearly every nation provides that the state must pay damages for any injuries resulting from an improper inspection or an abuse of power.	Italy, France, Egypt, Mexico, Brazil, U. K., Greece, Russia, Japan, Turkey, Germany
3.5.2.2	(75) In most countries, damages are assessed on a compensatory basis for actual losses including lost profits, but compensation is not available for "immaterial," "moral," or "punitive" damages.	Egypt, U. K., Italy, Mexico, Russia, Japan, Germany
3.5.7 2	(76) Most reports do not identify how damages may be calculated in the specific context of an illegal search.	Brazil, Turkey
3.5.2.2	(77) In most countries, the state must pay damages only for injuries caused by an action contrary to law (i.e., if administrative regulations are improperly executed).	Russia, Hungary
	<p><i>Recommended Legislative Authorization For CWC Inspections</i></p> <p>Various reporters indicated shortcomings in the CWC regime and recommended that the CWC require domestic legislation.</p>	
3.6	(78) Warrantless CWC inspections may contravene constitutional rights – the CWC should require inspectors to secure a warrant, provide the same protections as a warrant, or enumerate the powers of inspectors.	Chile, Turkey, Hungary
3.6	(79) The CWC's failure to compel individuals to consent to a search or to require punishment of those who do not cooperate will cause enforcement problems – the CWC should require national legislation that obliges facilities to consent to inspections.	India, Russia, Brazil

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
	<i>Expropriation of Property</i>	
4.2.1.1	(81) Human rights systems permit interferences with the right to private property if the interference is proportional to a legitimate public purpose. A person may not be arbitrarily deprived of property; anyone so deprived is entitled to fair compensation.	U.N., ECHR, IACHR
4.2.1.2	(82) In a few countries, the constitution provides that the government cannot take property except in the public interest and upon payment of just compensation.	Mexico, Turkey, France, Germany
4.2.1.2	(83) Where the constitution does not prohibit takings, the protection against uncompensated governmental expropriation is less definite.	India, Russia
	<i>Confiscation of Property</i>	
4.2.2	(84) In some countries, property that was instrumental in a crime or resulted from a crime may be confiscated.	Hungary, Brazil, Germany
4.2.2	(85) In a few countries, confiscation is limited to satisfy the imposition of a fine or criminal penalty.	Chile, Russia, Czechoslovakia
	<i>License Revocation for CWC Violations</i>	
4.2.3	(86) There is nearly unanimous agreement that activities that violate a ratified CWC would support revoking a license, especially if that treaty so specified.	Mexico, U. K., Italy, Russia, India, Iran, Greece, Egypt, Chile, France, Hungary, Czech., Germany
4.2.3	(87) In many of the countries, the failure of inspectors to observe CWC inspection procedures may provide a facility with a defense against a revocation.	Turkey, China, Mexico, Italy

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
<i>Trade Secret Protection</i>		
4.3.1	(88) Many countries regard trade secrets as property.	Morocco, U. K., Iran, Egypt, Czech.
4.3.1	(89) In some nations that do not regard trade secrets as property, there is a legal right to the protection of secrets from undue disclosure.	Greece, Israel, Russia, France
4.3.2	(90) All nations that accord value to trade secrets impose civil or criminal liability for their undue disclosure.	Brazil, Russia, Egypt, Morocco, Turkey
4.3.3	(91) Most countries obligate officials to protect trade secrets and impose sanctions for breach of this duty.	Turkey, Brazil, Hungary, Morocco, Greece, Germany
4.3.3	(92) A few countries provide that the state may be liable when regulation leads to trade secret disclosure.	Iran, Egypt, France
<i>Injunctions To Protect Trade Secrets</i>		
4.3.4	(93) Only a few countries would consider enjoining an inspection because a trade secret could be disclosed.	Mexico, Chile, Greece, U. K., Brazil
4.3.4	(94) In some countries, possible disclosure of a trade secret might result in a grant of injunctive relief.	Egypt, India
4.3.4	(95) In some nations, injunctive relief is unavailable lest it impede the duty to comply with treaty obligations.	Iran, Russia, Morocco
4.3.4	(96) In other countries, an injunction is denied because a damages remedy is available after undue disclosure.	Turkey, Hungary, Czechoslovakia
<i>Damages for Inspections That Interfere with Property Rights</i>		
4.4.1	(97) In some countries, the state must pay damages if its agents exceed the authorized scope of an inspection.	Hungary, Greece, Iran, Chile, Turkey
4.4.1	(98) In some countries, damages are available only for the actual harm caused by an inspection.	Egypt, Russia
4.4.2	(99) In some countries, a plaintiff's violation of the CWC will bar him/her from suing the government.	China, Iran, Russia, Czechoslovakia
4.4.2	(100) In some countries, the right to damages is not forfeited by the plaintiff's prior illicit behavior.	Chile, Greece, Egypt, U. K.

Table S-1. Summary table classifying the majority responses of legal systems surveyed and significant exceptions (Continued).

Section	Significant Responses of Legal Systems Surveyed	Representative Legal Systems
<i>Protection Against Self-Incrimination</i>		
5.2.1	(101) Some countries recognize a constitutional right against self-incrimination but may limit its scope.	India, Germany Turkey, Chile, Japan, Czechoslovakia, Brazil
5.2.1	(102) In most countries, the right against self-incrimination is a statutory rather than constitutional guarantee.	Greece, Israel, U.K., Morocco, Hungary
5.2.1	(103) Countries that have no specific right against self-incrimination prohibit coercion by investigators.	Russia, China
5.2.2	(104) Some countries grant immunity only in certain cases. Some countries will not grant immunity at all.	U. K., Greece Chile, Italy
<i>Use of Evidence Discovered During an Administrative Inspection</i>		
5.3.1	(105) Only a few countries limit the use of evidence obtained during administrative inspections.	Japan, France
5.3.1	(106) Some countries have procedures that inspectors must observe if they discover evidence of illegal activity.	Iran, Brazil, Morocco, India, Germany
5.3.1	(107) In some nations, inspectors' failure to observe CWC provisions or domestic law may taint evidence obtained during an inspection.	Egypt, Greece, U. K., Germany
5.3.1	(108) A few nations allow the use of evidence obtained by an inspection even if inspectors violate procedures.	Israel, China, Chile
<i>Communication of Evidence</i>		
5.3.2.1	(109) Every country provides that evidence may be communicated to another domestic authority.	Greece, Mexico, Russia, Czech.
5.3.2.1	(110) In most countries, the decision to transmit evidence to other governmental entities is discretionary. In some countries, evidence must be communicated.	Brazil, Turkey, Hungary, Italy, Chile Germany
5.3.2.2	(111) Transmitting evidence to foreign authorities is widely permitted, but most states require that transmission proceed only under a mutual legal assistance treaty.	Israel, Chile, Hungary, Italy, Mexico, Greece, Turkey, India, China
5.3.2.2	(112) If the CWC so requires, nearly all states would allow communication of evidence to to a foreign state.	Morocco, Brazil, Czechoslovakia

PREFACE

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SECTION 1

INTRODUCTION

The Draft Chemical Weapons Convention (CWC)¹ authorizes an unprecedented level of international law enforcement to verify compliance with its prohibition against developing, producing, stockpiling, or transferring chemical weapons. In many countries, as well as in several international treaties, there exist constitutional provisions and laws that protect individual and commercial rights. Since the CWC verification scheme could contravene those rights, the extent and consequences of any potential conflicts must be properly understood so as to resolve any potential disputes and allow CWC implementation to proceed unimpeded. The purpose of this Report is to assess the extent to which CWC inspections can be implemented in some of the nations that may sign the CWC.

1.1 OVERVIEW OF REPORT.

This Report compares the legal systems of 19 nations and three international human rights systems as they may be relevant to the CWC: Brazil, Chile, China, Czechoslovakia, Egypt, France, Germany, Greece, Hungary, India, Iran, Israel, Italy, Japan, Mexico, Morocco, Russia, Turkey, the United Kingdom, the U.N. Norms and Standards, the Inter-American Human Rights System, and the European Convention for the Protection of Human Rights.

Questionnaires were sent to legal scholars in each jurisdiction. This Report digests and analyzes the responses received, edited versions of which are available under separate cover. It should be noted, therefore, that the assertions of national law contained herein reflect the insights and opinions of one selected expert in that system concerning the most salient aspects of the CWC, but they do not necessarily represent the only possible legal interpretation. Furthermore, since the Report is, by definition, a distillation of the Questionnaire responses, not every response is reflected in the body of Report.

¹This study was based on the June 22, 1992 version of the United Nations Conference on Disarmament: Draft Convention on the Prohibition of the Development, Production, Stockpiling and Use of Chemical Weapons and on their Destruction, U.N. Doc. CD/CW/ WP.400/Rev. 1 (22 June 1992). By the time of the completion of this Report, the most recent version is U.N. Doc. A/47/27 (23 September 1992) [hereinafter *Draft Convention*]. As of April 1, 1993, this version of the CWC has been signed by 141 nations. Since this new version was issued after the various national experts returned their reports, most changes are not reflected in this study. The only noteworthy use of the new document concerns the recommendations discussed in Appendix A, section 3, concerning restrictions on the trade of chemicals. A key part of the *Draft Convention* for this analysis is the Annex on Implementation and Verification [hereinafter *Verification Annex*] which specifies the details of the CWC on-site inspection scheme.

The need for this analysis originated from a prior study of potential conflicts between the CWC and the United States Constitution.² That study concluded that verification provisions in the CWC could threaten rights guaranteed by the United States Constitution and that a combination of domestic implementing legislation and changes in the CWC itself could avoid constitutional conflicts.³ Consequently, the question arose whether analogous issues might be raised in foreign countries. Thus, the present report should be read in the context of earlier research regarding problems relating to CWC implementation in the United States. Indeed, each section herein begins with a brief statement of United States law on relevant issues so as to draw comparisons to the law of the studied nations.

The remainder of this section presents an explanatory overview of the CWC to provide context for each subsequent section's detailed descriptions of treaty elements. Five additional sections comprise the body of this Report. Section 2 presents an analysis of the ratification, implementation, and constitutional review of treaties. Section 3 compares the right to privacy in various countries and the extent to which searches of homes, as well as public and commercial facilities, may be carried out. Section 4 discusses legal problems that may arise where searches interfere with property rights. Section 5 assesses the penal law implications of CWC inspections. Section 6 presents conclusions. Four appendixes follow this Report. Appendix A discusses a series of recommendations that flow from and were inspired by this study. Appendix B is a matrix of all national responses to over forty issues raised herein. Appendix C lists the experts involved in this study. Appendix D contains the Questionnaires sent to these experts.

The comparative study of CWC implementation has generated numerous issues and identified, as to each, a set of typical responses. Having done this work, the scope of this study could easily be expanded to include every possible signatory to the CWC. No new report for each country need be prepared. Instead, this Report, along with the Matrix of Legal Issues (*see* Appendix B, *infra*), could be circulated to many additional foreign experts and/or to the Ministries of Justice of potential State Parties in order to secure their input and additions. The growing aggregation of expertise on the legal issues raised by the CWC could facilitate implementation both internationally and within each country.

1.2 OVERVIEW OF THE DRAFT CHEMICAL WEAPONS CONVENTION.

The CWC has two goals. First, it mandates the declaration and destruction of existing chemical weapon stockpiles and production facilities.⁴ Destruction of chemical weapons must

²See E. TANZMAN & B. KELLMAN, HARMONIZING THE CHEMICAL WEAPONS CONVENTION WITH THE UNITED STATES CONSTITUTION, (DNA-TR-91-216, 1992).

³*Id.* at iii.

⁴*Draft Convention, supra* note 1, art. I, §§ 2-4.

begin within two years and be completed not later than ten years after the CWC takes effect.⁵ Subject to environmental, health, and safety restrictions,⁶ each State Party may destroy its weapons and facilities by any means it chooses, so long as the destruction can be verified.⁷

Second, the CWC seeks to deprive states of the industrial capability to resume chemical weapons production and storage. Verifying nonproduction of chemical weapons is the core of the CWC. Even State Parties with no chemical weapons to be destroyed must comply with the verification measures.⁸ While each State Party has the right to produce and use toxic chemicals for legitimate commercial purposes, such production and use carries the concomitant obligation to ensure that these chemicals are not used for purposes prohibited by the CWC.⁹ Verification of activities not prohibited by the CWC entails an elaborate mechanism for monitoring all production and acquisition of various chemicals by signatory nations.¹⁰

In order to accomplish its goals, the CWC creates the Organization for the Prohibition of Chemical Weapons (the "Organization"), an international body that will monitor the production capabilities and activities of State Parties in order to ensure that the objectives of the CWC are, in fact, being met.¹¹ The Organization will be a powerful international regime, vested with extensive legislative, investigative, and judicial responsibilities.¹² Taken as a whole, it signifies a systematic introduction of international law enforcement into chemical weapons control.

To verify that new chemical weapons are not being produced, the CWC categorizes a wide range of industrial chemicals into three Schedules based on their suitability for use in

⁵*Id.* art. IV, § 6. The destruction of chemical weapons production facilities must begin within one year and be completed not later than ten years after the CWC takes effect. *Id.* art. V, § 8.

⁶*Id.* art. IV, § 11; art. V, § 11.

⁷Verification Annex, *supra* note 1, pt. IV(A), C(13)-(14); pt. V, B(11), C(44)(a).

⁸*See generally* Draft Convention, *supra* note 1, art. VI.

⁹*Id.* § 1.

¹⁰*Id.* §§ 2-8.

¹¹*Id.* art. VIII.

¹²The Organization will comprise three bodies. The Conference of State Parties will be authorized to enact rules of procedure, assess compliance and resolve issues as to the scope of the CWC. The Executive Council will oversee day-to-day activities, including supervising verification. The Technical Secretariat will have primary responsibility for monitoring and inspecting facilities that could become involved in illegal chemical weapons production. *Id.*

weaponry and their legitimate commercial value.¹³ State Parties must make initial and annual declarations of the total amount of each scheduled chemical produced, consumed, imported, or exported and the purposes for which these chemicals are obtained or processed, as well as extensive information about production facilities.¹⁴ The disclosure requirements vary according to the applicable Schedule for the chemicals at the facility.¹⁵

The principal methods of verification are "routine inspections" and "challenge inspections." Routine inspections permit the Technical Secretariat to verify that annual declarations for most "declared facilities" are accurate. The two goals of routine inspections are to deter violations without hampering the economic or technological development of State Parties,¹⁶ and to compile sufficient accurate information to permit a high degree of accord among the parties as to what specific conduct constitutes a violation.

Challenge inspections serve a complementary function. If a State Party suspects noncompliance by another, that State Party may request an inspection of any "facility or location"¹⁷ Challenge inspections are relatively unconstrained, with the goal of "clarifying and resolving any questions concerning possible non-compliance."¹⁸

Both types of inspections share the common goal of verifying the nonproduction of chemical weapons without interfering with the legal rights of State Parties or their citizens. The CWC's guiding principle is that on-site inspections be implemented in a manner that avoids undue intrusion into activities engaged in for peaceful purposes.¹⁹

¹³*See Id.* Annex on Chemicals.

¹⁴*Id.* art. VI, §§ 3-6.

¹⁵State Parties must declare annually the locations, inventories, and past and future activities of Schedule 1 facilities. Verification Annex, *supra* note 1, pt. VI, D. State Parties must also annually declare various national data regarding their Schedule 2 chemicals, as well as the location of each Schedule 2 facility, the types, quantities and destinations of its Schedule 2 chemicals, and the owners, capacities, purposes and plans of its Schedule 2 facilities. *Id.* pt. VII, A. Declaration requirements for Schedule 3 facilities and "other relevant" facilities are similar. *Id.* pt. VIII, A; pt. IX, A.

¹⁶*Draft Convention, supra* note 1, art. VI, §§ 10-11.

¹⁷*Id.* art. IX, § 8.

¹⁸*Id.*

¹⁹*Id.* art. VI, § 10.

SECTION 2

CWC RATIFICATION AND IMPLEMENTATION BY STATE PARTIES

The process by which each surveyed State Party will formally enter into the CWC depends both on the terms of the CWC and on the role of treaties in each nation's domestic law. Unique aspects of national legal systems may affect a State Party's ability to implement the CWC. Therefore, this section compares domestic ratification procedures, the process for judicial review of treaty constitutionality, and the extent to which CWC inspections will be "state action."

In the United States, the CWC implementation process will begin with Presidential signature and submission to the U.S. Senate.²⁰ Upon Senate consent by a two-thirds margin and Presidential ratification, the CWC will become the supreme law of the land.²¹ However, no provision of a treaty may contravene any of the prohibitions or limitations of the Constitution.²² While the judiciary has no authority to review a treaty's constitutionality before ratification, it has the authority to interpret treaties whenever relevant to the resolution of a legal controversy.²³ CWC inspections will be actions of the United States because their requirements cannot be fulfilled without legislation and because of the government's sovereign jurisdiction over persons and activities within this nation.²⁴

2.1 RELEVANT CWC PROVISIONS: STATE OBLIGATIONS.

The CWC will be open to signature by all states.²⁵ After signing, State Parties will need to ratify the treaty in conformity with their respective constitutional processes.²⁶ The treaty will enter into force 180 days after the 65th state ratifies it,²⁷ but not until two years after it has

²⁰U.S. CONST. art. II, § 2, cl. 2.

²¹U.S. CONST. art. VI, § 2.

²²Reid v. Covert, 354 U.S. 1, 15-19 (1957). See 1 RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 302 (1987).

²³II M.C. BASSIOUNI, INTERNATIONAL EXTRADITION 77 (1987).

²⁴TANZMAN & KELLMAN, *supra*, note 2, at 11-12.

²⁵Draft Convention, *supra* note 1, art. XVIII.

²⁶*Id.* art. XIX.

²⁷*Id.* art. XXI, § 1.

been opened for signature.²⁸ For any State Party that ratifies or accedes²⁹ to the CWC after it has come into force, the treaty will be binding upon that state thirty days after it deposits the instrument of ratification or accession.³⁰

State Parties must bring the CWC into effect by taking some steps beyond mere ratification. First, each State Party must adopt, in accordance with its constitutional processes, measures to implement its CWC obligations.³¹ Each State Party must enact legislation including administrative as well as penal measures to prohibit natural and legal persons in its territory or under its jurisdiction from pursuing any CWC prohibited activity.³² Moreover, State Parties must cooperate with each other and provide appropriate legal assistance necessary to implement CWC obligations.³³ Finally, State Parties must designate or establish a National Authority to serve as a liaison with the Organization.³⁴

The inspected State Party must assist the Technical Secretariat,³⁵ in the conduct of on-site inspections. At the outset, the inspected State Party must extend certain privileges and immunities under the Vienna Convention on Diplomatic Relations³⁶ to the inspection team and must provide the necessary visas to the inspectors and assistants.³⁷ The inspected State Party must designate a point of entry from which the inspection team can conveniently reach the inspection site,³⁸ and must guarantee the immediate entry of the inspection team into its territory and its safe transport from the point of entry to the inspection site.³⁹ Once the inspection team is at the site, the inspected State Party must provide substantial logistical

²⁸*Id.*

²⁹Any state which does not sign the CWC before it enters into force may accede to the treaty at any time. *Id.* art. XX.

³⁰*Id.* art. XXI, § 2.

³¹*Id.* art. VII, § 1.

³²*Id.* § 1(a), (c). Thus, the CWC calls for the criminalization of prohibited conduct.

³³*Id.* § 2.

³⁴*Id.* § 4.

³⁵*Id.* § 7.

³⁶*Id.* Verification Annex, *supra* note 1, pt. II, B(11).

³⁷*Id.* (10).

³⁸*Id.* C(16).

³⁹*Id.* D(35).

support including means of communication, interpreters, transportation, work space, lodging, meals and medical care.⁴⁰ The inspected State Party must brief the inspection team about facility safety and logistics before the inspection begins.⁴¹

Specific provisions require the inspected State Party to be involved in the conduct of inspections. The CWC specifies two types of agents to represent the inspected State Party during the course of an inspection: an "in-country escort" to assist the inspection team while they are in the country,⁴² and the designated "representative" who may accompany the inspection team during the performance of its duties.⁴³ During the actual inspection, the inspected State Party's representative plays a significant role. Besides exercising the right to observe, the representative, when the inspection team requests, must take samples⁴⁴ and assist in the on-site analysis of samples.⁴⁵ The inspected State Party is also entitled to receive copies of information and data gathered by the inspection team.⁴⁶ Once the inspection is complete, the inspected State Party is entitled to a debriefing as to the inspection team's preliminary findings.⁴⁷ The inspected State Party will also receive the final report, to which it may add comments.⁴⁸

2.2 TREATY RATIFICATION.

A state makes a treaty domestically effective through ratification. Treaty ratification requires different steps in different nations. Key variables among countries include: the components of government responsible for ratification, the validity of attaching reservations to a treaty, the place treaties occupy in the hierarchy of national law, and the extent to which implementing legislation will be needed to make the CWC fully effective.

⁴⁰*Id.* C(26). Any cost to the State Party will be reimbursed by the Organization.

⁴¹*Id.* D(37).

⁴²*Id.* pt. I, (9).

⁴³*Id.* pt. II, (E)(41). This representative has the right to observe all of the verification activities carried out by the inspection team. *Id.* (49).

⁴⁴*Id.* (52).

⁴⁵*Id.* (53). The inspected State Party also has the right to take duplicate samples or retain portions of samples taken. *Id.* (54).

⁴⁶*Id.* (50).

⁴⁷*Id.* (60).

⁴⁸*Id.* G(63).

2.2.1 Authority to Sign and Ratify Treaties.

Every nation surveyed vests the authority to negotiate treaties in a duly authorized representative of the Executive. In some countries, such as Iran, the legislature may set limits on the power of the Executive before negotiations proceed. In all countries, authority to sign a treaty is vested in the Executive.

The effect of the Executive's signature, however, varies among nations. In a few countries, a signed treaty need not be legislatively approved. In China, the Standing Committee on the National People's Congress (SCNPC) ratifies treaties which must then be approved by the President of the People's Republic. In Morocco, the King has unilateral authority to ratify a treaty, but if it involves state finances then the house of representatives must approve it. Similarly in Germany, the President ratifies international treaties, but if a treaty involves a transfer of sovereign powers to an intergovernmental organization or triggers constitutional safeguards, parliamentary consent by a qualified majority is necessary prior to its entering into force. In France, a treaty could become effective upon agreement, but this would have the undesirable consequence of depriving Parliament of its constitutional prerogatives.

The majority of nations surveyed require some legislative action to make a treaty binding domestically. For example, in Brazil, it is within the President's exclusive province to sign international treaties, but, under Article 49 of the Constitution, the National Congress must approve a treaty for it to come into force. Likewise in Mexico, the Constitution requires Senate ratification of an international treaty for it to be binding under domestic law. Interestingly, no treaty will be sent to the Senate for approval unless the necessary domestic implementing legislation is already in place. In Russia, an international treaty is submitted for ratification to the Russian Congress which gives its conclusions and recommendations in a draft ratification proposal, and then, if acceptable to all chambers, adopts the treaty. In Japan, Article 73 of the Constitution provides that all treaties must be concluded by the Cabinet and approved by the Diet.

A few countries require legislative action but do not specify a formal process of ratification. One example is Israel's hybrid system: the government is solely authorized to sign and ratify international treaties, but a binding custom requires the Knesset's approval of international treaties that are of particular importance to Israel. Similarly, the Czechoslovak Constitution does not contain any provision about when and how an international treaty becomes domestic law. Yet, those treaties which require implementing legislation must be approved by the Federal Assembly. This can happen either by: (1) enactment of domestic laws identical in normative content to the provisions of the treaty, or (2) incorporation by reference to the text of a self-executing treaty in domestic law.

2.2.2 Reservations or Limiting Clauses.

The power to attach reservations or limiting clauses to a treaty is recognized as an inherent aspect of sovereignty in international law. A limitation on this sovereign right can be

found in France where Parliament cannot directly amend or attach a reservation to a treaty, nor can it amend a treaty after its ratification.

There are, however, limits to a state's power to make reservations to a treaty. Reservations are not effective if they undermine or contradict the essential objectives of the treaty to which they are attached.⁴⁹ In general, a reservation may refer (1) explicitly and specifically to a provision of the treaty, (2) generally to constitutional protections, or (3) ambiguously to some standard which lacks clearly understood criteria.

Reservations of the third type may be invalid if submitted after the nation's consent to the treaty. This was the case when Iran, one of the surveyed countries, attempted to insert limiting conditions in the ratification text of the 1988 United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances⁵⁰ such that it would not be binding on Iran when in contravention of Iran's internal laws or the principles of Islam. However, such a reservation may not be valid as a matter of international law because the content of the restriction was not known to the other negotiating states prior to the Iranian representative expressing consent to the treaty.⁵¹

2.2.3 Treaties in the Hierarchy of National Law.

A ratified treaty is binding on the state internationally, but the treaty does not necessarily have internal effect. What must be done to make it internally effective depends on whether a nation adheres to the doctrine of monism or dualism. Monism views domestic and international law as a single legal system.⁵² If there is a conflict between international law and domestic statutory obligations, international law governs.⁵³ If there is a conflict between an international treaty and a nation's constitution, the constitution may govern if it so specifies. France explicitly adheres to the monistic relation between international and domestic law. Under article 55 of the Constitution, a ratified treaty is superior to domestic statutes but inferior to the Constitution; conflicts between a treaty and domestic law will be

⁴⁹Advisory Opinion by the International Court of Justice on Reservations to the Convention on Genocide, 1951 I.C.J. Ref. 15.

⁵⁰United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, U.N. Doc. E/Conf.82/15 Corr. 1 and Corr. 2, *reprinted in* I.L.M. 493 (Done at Vienna, November 25-December 20, 1988).

⁵¹*See Amoco Iran Oil Co. v. Iran*, Case No. 55, 70 I.L.R. 490 (1982).

⁵²L. HENKIN, R. PUGH, O. SCHACTER, H. SMIT, *INTERNATIONAL LAW* 140-141 (2d ed. 1987) [hereinafter L. HENKIN].

⁵³I. BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 32-33 (4th ed. 1990).

resolved by the principle of hierarchy of norms. In Morocco, no similar law of general application exists, but legal doctrine is favorably disposed toward the principle of monism.

The doctrine of dualism assumes that international law is distinct from domestic law and that the former regulates only conduct between sovereign states.⁵⁴ States that adhere to the dualistic relation between international and domestic law are legally bound to a treaty upon ratification as a matter of international law. Yet, a treaty is not a part of domestic law and has no internal effect until its incorporation through passage of domestic legislation.⁵⁵ For example, the Hungarian Constitution, section 7(1), declares that the provisions of international treaties may affect Hungarian domestic law only when the treaty becomes a part of domestic law pursuant to domestic legislative action. Similarly in Germany, an international treaty becomes part of domestic law either by an act of adoption whereby the treaty retains its international status, or by transformation which incorporates international norms into the domestic legal order with the same status as a statute.

Under the doctrine of dualism, neither international law nor domestic law has the power to create or alter the rules of the other; both fields operate in parallel.⁵⁶ If there are any conflicts, a domestic judge will not be bound by international law and will apply domestic law.⁵⁷ Therefore, to avoid problems, dualists favor express incorporation of international legal obligations into domestic law. Yet, international law as incorporated into domestic law by statute is subject to constitutional limitations applicable to all domestic law, and may be repealed for purposes of domestic law by a subsequent enactment.⁵⁸

Typically, the position of a treaty in relation to domestic legal norms is specified as a matter of national law. In most countries, treaties occupy a status between constitutional provisions and statutes. In Russia, legal doctrine favors the idea of the supremacy of international treaty provisions; supremacy becomes unequivocal only when the treaty is incorporated into domestic legislation that specifically so provides. In Greece and Czechoslovakia, treaty provisions supersede domestic law but not constitutional provisions. In China, international treaties are recognized as prevailing over domestic law. In Japan, a treaty that is in conflict with the Constitution is invalid.

⁵⁴B. WESTON, R. FALK & A. D'AMATO, *INTERNATIONAL LAW AND WORLD PUBLIC ORDER* 172 (2d ed. 1990) (citing J. STARKE, *AN INTRODUCTION TO INTERNATIONAL LAW* 68-69 (9th ed. 1984)). See also I. BROWNLIE, *supra* note 53, at 32-33.

⁵⁵L. HENKIN, *supra* note 52, at 140-141.

⁵⁶L. OPPENHEIM, *INTERNATIONAL LAW - VOLUME I* 37 (H. Lauterpacht ed.) (8th ed. 1955).

⁵⁷I. BROWNLIE, *supra* note 53, at 32-33.

⁵⁸L. HENKIN, *supra* note 52, at 140.

In a few countries, treaties are not superior to domestic statutory law. For example in Iran, treaties are inferior to the Constitution and ordinary law. If the treaty provisions contradict fundamental or ordinary law, or are contrary to religious principles, the treaty can be voided or not applied. Similarly in Israel, when treaties conflict with domestic law, the latter prevails. In Turkey, Brazil, and Chile, a treaty has the same force as an ordinary statute -- both are subordinate to the Constitution.

2.2.4 Need For Implementing Legislation Beyond Ratification.

In most countries where legislation is necessary to make a treaty binding domestically, supplemental legislative action may be required to harmonize any disparities between the treaty and existing domestic law. All national reporters agree that implementing legislation will be indispensable for the CWC. Whether such legislation must be more extensive than what is minimally necessary for ratification varies from state to state, yet all reporters agreed on the desirability of expansive legislation. Thus, in Morocco where treaty ratification is solely the function of the King, potential ambiguities as to the treaty's application should be addressed by enacting legislation to reconcile domestic law with the CWC provisions. Similarly, the Russian reporters recommend enactment of CWC implementing legislation to reconcile any incongruities. However, Russian constitutional law does not require the enactment of a special-purpose law since the ratification decree may authorize state agencies to reconcile the pertinent rules of domestic law with the treaty's rules.

In some countries, the more a treaty affects citizens' rights, the greater the need for implementing legislation. In the United Kingdom, since the CWC will affect individual rights and not merely state organs, domestic implementing legislation will be required. The Mexican reporter urged that even if the CWC would not contradict domestic law, and consequently Senate approval would not require enabling legislation, the government should consider enacting legislation to prevent potential conflicts and ensure that inspections are subject to the laxest possible restrictions within constitutional limits. The Iranian reporter suggested: "In view of the unequal value of treaties and laws under Iranian law, it will be necessary for the text of the treaty to be specific and explicit. . . In addition, the government must be obligated by the treaty to incorporate the text of the treaty into Iranian law."

2.3 JUDICIAL REVIEW OF TREATY CONSTITUTIONALITY.

The chief legal consideration regarding CWC implementation is the possibility that a court could disapprove the treaty, despite the CWC's procedurally proper ratification, on the grounds that compliance efforts contravene the national constitution. This possibility of judicial interference with implementation is analytically distinct from judicial review of claims for relief resulting from unlawful inspections as discussed *infra*, § 3.5.

2.3.1 Separation-of-Powers Limitations of Judicial Review.

Some countries forbid judicial scrutiny of ratified treaties on the grounds of separation of powers and deference to the non-judicial branches of government over foreign affairs. The Czechoslovakian Constitution denies review of international treaty provisions. The rationale is that if a court held a provision unconstitutional, that provision would not be binding domestically, yet the government would still be bound under international law. Therefore, Parliament was unwilling to confer on the court the power to review a treaty's constitutionality.

Similarly in Morocco, judicial review of a treaty is "unimaginable" because it would require reviewing acts of government thereby risking prejudice to the general interest and interfering with the prerogatives of another branch's power. In Iran, this prohibition is even more emphatic: "The law can restrict the rights of citizens, and the citizens have no body to which they can appeal to have their rights restored." In China, the NPC or SCNPC decide on treaties. Their decisions are not subject to review by the Supreme People's Court. In Japan, courts are authorized to review a treaty, but the more it affects international politics, the more the courts hesitate to review it.

Some countries preclude a direct legal challenge to a treaty, but judicial review may proceed by a request for a declaration. In Israel, judicial review of treaties was unavailable until a recent Supreme Court opinion posited that there are no state acts that are altogether non-justiciable. In principle, therefore, treaties may be reviewable, but the range of causes that might lead to a challenge remains very restricted. It is possible to seek a declaration that the state's activity or obligation is illegal and, since the state generally abides by such a judicial declaration, it could prevent inspections. Likewise in the United Kingdom, a request for a declaration is the only way to challenge action pursuant to a treaty that is otherwise immune from challenge. A declaration may be granted if government inspectors violate rights by exceeding their conferred powers or by carrying out an inspection in circumstances where they had no right to do so.

2.3.2 Contesting Treaty Constitutionality.

The countries that permit judicial scrutiny of treaties differ as to whether review may precede ratification. Judicial review of the CWC before ratification could threaten its approval if the treaty is ruled unconstitutional. Post-ratification judicial review could prohibit any unconstitutional aspects of its implementation.

2.3.2.1 Review of Treaty Constitutionality Before Ratification. Certain national legal systems provide for judicial review of a signed convention prior to its ratification. In a few countries, pre-ratification judicial review is possible upon request from an authorized Executive agent or member of the legislature. In Russia, Article 57 of the Law On The Constitutional Court, May 6, 1992, authorizes the Constitutional Court "to consider the constitutional legality of RSFSR international treaties that have or might have direct legal

effect on its territory." If, during an international treaty's preparation, concerns arise that its implementation might affect the rights of citizens, the Congress of People's Deputies of the Republic, the Parliament, the President of the Russian Federation, Council of Ministers, or the Procurator-General are empowered to petition the Constitutional Court to consider the treaty's constitutionality. If the Constitutional Court holds an international treaty unconstitutional, in whole or in part, it cannot be ratified nor brought into effect.

In Hungary, ordinary courts have no power to review treaties. Yet, prior to ratification, the National Assembly, the President of the Republic, or the Government may ask the Constitutional Court to review the constitutionality of a provision of an international treaty. If this provision is ruled unconstitutional, the treaty cannot be ratified until it is harmonized with the constitution. In France, article 54 of the Constitution provides that the President of the Republic, the Prime Minister, the President of the National Assembly, the President of the Senate, or 60 deputies or senators may request the Constitutional Council to examine a treaty to determine its compatibility with the Constitution before Parliament ratifies it. If the Constitutional Council finds incompatibility, implementation of the treaty would be suspended until it conforms to the Constitution. In Chile, while Congress is debating a treaty, the President or Congress may ask the Constitutional Court to review the constitutionality of specific treaty provisions. If the challenged provisions contravene the Constitution, the treaty cannot be ratified. The treaty will be considered rejected unless the treaty is modified so as to bring it into accord with the Constitution.

2.3.2.2 Extent of Judicial Review. Among the countries surveyed that permit judicial review, the scope of review varies. Some countries permit both a suit challenging a treaty's constitutionality *and* a suit to prevent inspections which, as executed, would violate an individual's constitutional rights. In Chile, the Constitutional Court may be asked to review a treaty's constitutionality prior to its final approval. Subsequently, a treaty's constitutionality may be challenged before the Supreme Court in connection with a pending case, but only on different grounds than those already decided by the Constitutional Court (if such was the case). In Egypt, Article 175 of the Constitution declares that "the Supreme Constitutional Court is empowered to judicially review the constitutionality of laws and regulations." Furthermore, the administrative courts may prohibit the government from conducting or permitting an inspection in an unconstitutional manner or without proper authorization from the competent legal authority.

Some countries provide broad powers of judicial relief. In Italy, Article 134 of the Constitutional Law provides that an international treaty containing provisions inconsistent with any constitutional clause may be revised by the Constitutional Court. Similarly in Mexico, Article 17 of the Constitution provides that the Tribunals of the Federation have competence over all controversies arising over compliance or implementation of international treaties. In Turkey, the President, the party in power, the main opposition party, and/or the members of parliament who comprise 20% of that body, can, within 60 days, challenge the constitutionality of a treaty provision by bringing a "suit of nullity." If successful, this action nullifies the provision, at least as a matter of domestic law.

In Brazil, treaties are not subject to pre-ratification judicial review, but it is possible to challenge a treaty on the grounds of unconstitutionality by bringing direct actions to the Supreme Federal Tribunal pursuant to Article 102, III of the Constitution. These suits may be brought by any interested citizen. If an interested party demonstrates that a government inspection will exceed the legal limits, he may seek a "preventive writ" to order the government to refrain from the inspection. Similarly in Greece, the courts may examine the constitutionality of a convention but only in the context of a citizen's allegation that a provision transgresses his rights. Furthermore, the validity of administrative acts may be contested by petitioning the administrative courts or the Council of State.

In both France and Germany, judicial review is limited to the implementing legislation rather than the treaty itself. The French Constitutional Council may review the constitutionality of laws implementing a ratified treaty, but will refuse to review the conformity of domestic statutes with the treaty, despite the explicit prescription that treaties are superior to domestic law and despite the refusal of administrative bodies to apply the contrary law. Also, while current law prevents ordinary judges from reviewing treaty ratification or parliamentary authorization procedures, many French scholars favor this type of review and believe that the law may change to reflect this. In Germany, the federal government, a state government, or one-third of the members of the federal assembly may petition for review as to whether the ratification law is compatible with the Basic Law; if it is not, then the implementing law is void or non-applicable. This type of action is called abstract-norms-control proceeding.

In a few nations, the right to challenge a treaty is permitted only if a statute specifically so provides. According to the Law of the USSR, a citizen may initiate a court action challenging administrative actions that deny him the ability to exercise his rights. If the court finds that the action unlawfully infringes upon a citizen's rights, it will compel the administrative body to redress the wrong. Similarly in India, the Specific Relief Act entitles citizens to seek an injunction when an invasion of substantive rights is threatened.

2.4 CWC INSPECTIONS AS "STATE ACTION."

"State action" refers to activities involving a sufficiently close nexus to the government that the law regards such activities as conducted by the state itself.⁵⁹ The consequence of finding CWC activities to be "state action" is that whatever limitations apply to domestic law enforcement activities would also apply to CWC inspections. Every report agreed that CWC inspections will constitute "state action." Five reasons were stressed.

⁵⁹In American jurisprudence, "state action" is defined in *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974). Because most constitutional rights protect against infringement only by the government or its agents -- if there is no "state action," then, by definition, there has been no transgression of a constitutional right of the people.

First, national authorities will permit CWC inspections making them equivalent to other government regulatory efforts based on domestic law. In Chile, foreign law enforcement agents are not permitted to exercise their official authority without specific permission arising from a particular Chilean statute. Thus, the activities of international inspectors would be "acts of authority," not acts of private foreign citizens. In Turkey, the inspections will be state action for the same reason: the permission of the national authority is necessary for CWC inspectors to exercise their duties. However, unlike other government actions, the judiciary cannot intercede to prevent inspections.

Second, active participation by a host country's agents will render CWC inspections state action. In Egypt, the joint participation in facility inspections, within Egyptian territory, will suffice to characterize CWC inspections as state action. Similarly in both Germany and Hungary, inspections will qualify as state action because national authorities will participate in them. The Hungarian reporter noted that nations that have ratified the Treaty on Conventional Armed Forces in Europe (CFE) have experience with international inspections. An Inspection Agency has been established to accompany the international inspectors. However, this precedent is not precisely relevant to the CWC since the CFE applies exclusively to inspection of military facilities, not private establishments.

A third basis for state action, noted specifically by the German reporter, is that general principles of international law based upon the territorial supremacy and sovereignty of the state give the government exclusive authority to permit inspections. In Czechoslovakia, it can be deduced from the principle of territorial supremacy that, within its territory, the state maintains exclusive authority over all persons and things. Foreign states or international organizations can exert their authority within the territory of another state only with that state's consent.

A fourth basis for state action focuses on the fact that chemical weapons are, like all military weapons, under the government's exclusive control and regulation. In Brazil, Article 21, V, of the Constitution establishes the state's authority to fund and regulate the production and trade of warlike materials. The Ministry of the Army exercises this authority by registering and controlling companies that prepare controlled chemical products which could be used for military purposes. Brazil is already familiar with arms control inspections as a result of the Agreement for the exclusively Pacific Use of Nuclear Energy, signed with Argentina. This Agreement created the "Brazilian-Argentinean Agency for the Accountancy and the Control of Nuclear Materials" which has authority to conduct on-site inspections.

A fifth reason why CWC inspections will be state action is offered by Israel. The inspected State Party's agent must pursue necessary enforcement measures upon discovery of a CWC violation. Therefore, an Israeli representative must participate in or accompany each inspection, which will give the inspection the tone of "state action."

SECTION 3

CWC INSPECTIONS AND THE RIGHT TO PRIVACY

Unique among contemporary arms control treaties, the CWC provides for intrusive on-site inspections to verify compliance and search for evidence of CWC violations. This section explains how CWC inspections will be carried out, compares the contours of the right of personal privacy in different countries, contrasts the respective limits on searches of homes and administrative searches of facilities, and explores potential legal remedies available if inspections violate privacy rights.

In the United States, the Fourth Amendment commands that government authority respect a person's reasonable expectations of privacy.⁶⁰ Protection of the right to privacy applies to every legal person but not the federal government. In general, a search warrant, issued upon proof of probable cause that the search will discover evidence of a violation, is a necessary prerequisite to a constitutionally valid inspection.⁶¹ Nowhere is this protection stronger than in regard to an individual's home.⁶² While commercial property is entitled to Fourth Amendment protections, pervasively regulated industries have a reduced expectation of privacy such that warrantless inspections are permissible under defined circumstances.⁶³ Furthermore, Congress may empower federal agencies to conduct administrative inspections of commercial property when the public interests in the inspection outweigh the invasion of privacy that the inspection entails.⁶⁴

3.1 RELEVANT CWC PROVISIONS: INSPECTIONS.

On-site inspections are a primary means to verify that all State Parties are complying with the CWC. The principal types of inspection are "routine" and "challenge" inspections.

Routine inspections are to be carried out at "declared facilities" where illegal chemical weapons are likely produced or stored. These include facilities that produce, process, or consume listed ("scheduled") chemicals that are used in chemical weapons,⁶⁵ and facilities

⁶⁰Katz v. United States, 389 U.S. 347 (1967).

⁶¹Camara v. Municipal Court, 387 U.S. 523, 528-29 (1967).

⁶²Payton v. New York, 445 U.S. 573 (1980).

⁶³New York V. Burger, 482 U.S. 691 (1987).

⁶⁴Marshall v. W & W Steel Co., 604 F.2d 1322 (10th Cir. 1979).

⁶⁵*Draft Convention, supra* note 1, art. VI, §§ (3)-(5).

that produce specified quantities of particular classes of non-scheduled chemicals⁶⁶ (also known as "other relevant" facilities). The purpose of routine inspections depends on the type of facility being inspected. Inspections of Schedule 1 facilities will verify that the quantities of Schedule 1 chemicals are correctly declared.⁶⁷ Schedule 2 facilities will be inspected to determine that their activities are in accord with CWC obligations, that declarations are accurate, and that no Schedule 1 chemicals are there.⁶⁸ Inspections of Schedule 3 and "other relevant" facilities will verify the accuracy of declarations and the absence of Schedule 1 chemicals.⁶⁹

In contrast, challenge inspections are intended to clarify and resolve questions of non-compliance with the CWC and may be conducted anywhere a violation is suspected, regardless of whether the site is already subject to routine inspections.⁷⁰ Presumably, this may include private homes as well as government and commercial property. Thus, challenge inspections fill in gaps that might otherwise exist in the overall CWC verification scheme.

3.1.1 General Inspection Procedures.

Several provisions apply to both routine and challenge inspections, except where modified by specific inspection provisions. Inspections are to be performed in accordance with the CWC, the rules established by the Director-General of the Technical Secretariat, and individual "facility agreements" that are to be negotiated between a State Party and the Organization for routine inspections of declared facilities.⁷¹ The inspection team must observe the inspection mandate issued by the Director-General and conduct the inspection in a manner which creates the least possible inconvenience and disturbance for the State Party and the inspected facility.⁷² In carrying out inspection activities, the inspection team must observe safety regulations established at the inspection site.⁷³

⁶⁶*Id.* art. VI, §§ (5)-(6).

⁶⁷Verification Annex, *supra* note 1, pt. VI, E(21).

⁶⁸*Id.* pt. VII, B(15).

⁶⁹*Id.* pt. VIII, B(17) (Schedule 3) and pt. IX, B(14) (other relevant).

⁷⁰*Draft Convention, supra* note 1, art. IX, § 8.

⁷¹Verification Annex, *supra* note 1, pt. II, E(38). The provisions for facility agreements are found in pt. III, A(3)-(8).

⁷²*Id.* pt. II, E(39)-(40). The inspection must also be carried out in a manner which does not unnecessarily hamper or delay the operation of a facility or affect its safety.

⁷³*Id.* (43).

The inspection process begins when the Technical Secretariat designates inspectors for the task.⁷⁴ The Director General must notify an inspected State prior to the planned arrival of the inspection team at the site and must provide certain information concerning the inspection.⁷⁵ Prior to each routine inspection, facility representatives must brief the inspectors regarding the nature and layout of the facility and necessary safety and logistical considerations.⁷⁶ Representatives of the inspected State Party may accompany the inspection team at all times and have the right to request and receive copies of the information and data gathered about the facility.⁷⁷

The inspection team is entitled to search documents and records and take photographs of and samples from the facility.⁷⁸ While the inspection team cannot operate a facility, if the inspectors consider it necessary to their mission, they may request the designated representative of the facility to have a particular operation carried out to the extent possible.⁷⁹

In order to establish relevant facts, the inspectors have the right to interview facility personnel in the presence of the representatives of the inspected State Party. If the inspected State Party deems questions not relevant to the inspection, it has the right to object. However, if the inspection team chief believes that the question is relevant and states its relevance, s/he must provide the question in writing to the inspected State Party for reply. In its report, the inspection team may note any refusal to permit interviews or to allow questions to be answered or explanations to be given.⁸⁰

Upon completion of the inspection, the inspection team must meet with representatives of the inspected State Party and the facility to share the preliminary written findings of the inspection.⁸¹ Within 10 days, the inspection team must prepare a final report based on the

⁷⁴*Id.* A(1)-(9).

⁷⁵*Id.* D(31)-(32). The notification must contain: the type of inspection, the point of entry, the date and estimated time of arrival, the means of arrival, the site to inspected, the names of the inspectors and the inspection assistants, and, if necessary, aircraft clearance and special flights. *Id.* (32)(a)-(g).

⁷⁶*Id.* (37).

⁷⁷*Id.* (49)-(50).

⁷⁸*Id.* (46)-(48). For a full description of CWC sampling provisions *see Id.* (52)-(58).

⁷⁹*Id.* (40).

⁸⁰*Id.* (46).

⁸¹*Id.* (60).

inspection's findings and submit it to the inspected State Party, which in turn may annex comments.⁶² The final report, with comments, must be submitted to the Director-General of the Technical Secretariat within 30 days after the inspection.⁶³

In general, the members of the inspection team enjoy the same immunity from jurisdiction as diplomats under the Vienna Convention on Diplomatic Relations.⁶⁴ However, where the Director General believes that immunity would impede justice, s/he can accede to national legal jurisdiction if the implementation of the CWC is not prejudiced.⁶⁵

3.1.2 Special Routine Inspection Procedures.

Each State Party must negotiate facility agreements with the Organization which will govern the conduct of inspections of each declared Schedule 1, 2 or 3 facility and all "other relevant" facilities.⁶⁶ Pursuant to these agreements, the inspection team must have unimpeded access to search facilities.⁶⁷ The model agreements, to be prepared by the Preparatory Commission, will likely outline inspection procedures that may include identification of any future technological changes.⁶⁸

The Technical Secretariat must conduct routine inspections of Schedule 1, 2, 3 or "other relevant" facilities in a manner that does not unduly intrude into a State Party's legitimate chemical activities nor hamper economic or technological development.⁶⁹ The inspected State

⁶²*Id.* G(62). The report, which shall be kept confidential, must also contain information as to the manner in which the inspected State Party cooperated with the inspection team.

⁶³*Id.* (63).

⁶⁴*Id.* B(11)(e).

⁶⁵*Id.* (14).

⁶⁶*Id.*, pt. VI, E(25)-(27); pt. VII, B(24). Facility agreements must be based on a model agreement prepared by the Preparatory Commission. For Schedule 1 facilities, they must be concluded within 180 days of the CWC entering into force; for Schedule 2 facilities, 90 days after the initial inspection. Facility agreements are not required for Schedule 3 or CW-capable facilities unless requested by the inspected State Party. *Id.* pt. VIII, B(19); pt. IX, B(16).

⁶⁷*Id.* pt. II, E(45).

⁶⁸*Id.* pt. II, III(A)(8). The Preparatory Commission will be responsible for developing model facility agreements which must then be submitted to the Conference of the State Parties for consideration and approval. *Draft Convention, supra* note 1, art. VIII, § 21(i).

⁶⁹*Draft Convention, supra* note 1, art. VI, § 10-11.

Party must be given notice at least 24 hours before a routine inspection.⁹⁰ In addition to these provisions applicable to all routine inspections, separate annexes set out the procedures that govern routine inspections of each of the four types of facilities.

3.1.2.1 Schedule 1 Facilities. The number, intensity, duration, timing and mode of inspection of a Schedule 1 facility will be based on the risk that that facility poses to the objectives of the CWC and the characteristics of that facility.⁹¹

3.1.2.2 Schedule 2 Facilities. Schedule 2 facilities must receive an initial inspection within 3 years after the CWC enters into force.⁹² Subsequently, declared facilities must be inspected within one year after production, processing or consumption is first declared.⁹³ This initial inspection is important in determining the frequency and intensity of subsequent inspections. During the initial inspection, the inspectors must assess the characteristics of the facility, the nature of the activities carried out there, and the risk the facility poses to the CWC's objectives.⁹⁴

In selecting sites for inspection, the Technical Secretariat will consider the above factors and the results of the initial inspection.⁹⁵ The method used by the Technical Secretariat to choose the facilities to be inspected cannot be predictable.⁹⁶ Apart from challenge inspections, no facility can be inspected more than twice per calendar year.⁹⁷

A State Party must be notified of an inspection at least 48 hours prior to the arrival of the inspection team at the inspection site. Inspections may not last more than 96 hours, although extensions may be negotiated.⁹⁸ The areas of the facility to be inspected are explicitly

⁹⁰Verification Annex, *supra* note 1, pt. III, C(17). A State Party must be given 72 hour notice of an initial inspection. *Id.* (18).

⁹¹*Id.* pt. VI, E(23).

⁹²*Id.* pt. VII, B(16).

⁹³*Id.*

⁹⁴*Id.* (18). The following criteria will be considered: the toxicity of the scheduled chemicals, the quantity of the scheduled chemicals, the production capacity, and the capability for convertability for initiating the production of toxic chemicals. *Id.* (a)-(e).

⁹⁵*Id.* (20).

⁹⁶*Id.* (21).

⁹⁷*Id.* (22).

⁹⁸*Id.* (29).

defined,⁹⁹ as is the procedure for the inspection team must follow to request access to other parts of the site.¹⁰⁰ The inspection team is permitted to take and analyze samples and to inspect records.¹⁰¹

3.1.2.3 Schedule 3 Facilities. Declared facilities producing sufficient Schedule 3 chemicals will be randomly selected for inspection based on equitable geographical distribution of inspections and on information relating to the chemicals, characteristics and activities of the declared site.¹⁰² A State Party must be notified of the inspection at least 120 hours before the inspection team arrives at the site.¹⁰³ The inspection may not exceed 24 hours unless an extension is negotiated.¹⁰⁴ As with Schedule 2 facilities, the inspection team may view records and take samples.¹⁰⁵ The areas of the facility that may be inspected are expressly prescribed.¹⁰⁶

3.1.2.4 "Other relevant" facilities. "Other relevant" facilities will also be inspected on a random basis pursuant to the same procedure used to select Schedule 3 facilities, except that the Technical Secretariat may also consider proposals by State Parties.¹⁰⁷ Except for challenge inspections, no "other relevant" facility can be inspected more than twice in a calendar year.¹⁰⁸ The total number of "other relevant" and Schedule 3 inspections for a single facility cannot exceed three per calendar year, plus 5% of the total number of plant sites declared by a State Party or 20 inspections, whichever is lower.¹⁰⁹

⁹⁹*Id.* (28).

¹⁰⁰*Id.* (25).

¹⁰¹*Id.* (26)-(27).

¹⁰²*Id.* pt. VIII, B(14).

¹⁰³*Id.* (25).

¹⁰⁴*Id.* (24).

¹⁰⁵*Id.* (21)-(22).

¹⁰⁶*Id.* (23).

¹⁰⁷*Id.* pt. IX, B(11)(a)-(c).

¹⁰⁸*Id.* (12).

¹⁰⁹*Id.* (13).

A State Party must be notified of the inspection at least 120 hours before the inspection team arrives at the inspection site.¹¹⁰ The inspection may not last more than 24 hours unless an extension is agreed upon.¹¹¹ The inspection team may examine records only if the inspected State Party agrees that such access will aid the inspection.¹¹² Sampling and analysis of samples are also permitted.¹¹³ "Other relevant" facilities qualify for the "managed access" procedures discussed *infra*.¹¹⁴

3.1.3 Challenge Inspection Procedures.

A State Party requesting a challenge inspection must limit the request to the CWC's scope and provide all appropriate information that is the basis for concern as to possible non-compliance.¹¹⁵ Each State Party must refrain from making unfounded requests; a challenge inspection can be performed only to verify facts related to non-compliance.¹¹⁶

A State Party must permit the Technical Secretariat to conduct a challenge inspection.¹¹⁷ A State Party must also make every effort to demonstrate compliance, provide access to the requested site,¹¹⁸ and assist the inspection team throughout the inspection.¹¹⁹ A State Party may, however, take measures to protect sensitive installations and prevent disclosure of confidential information not related to the CWC.¹²⁰

The Director-General must transmit notice of the inspection to the inspected State Party at least 12 hours prior to the arrival of the inspection team at the point of entry.¹²¹ The

¹¹⁰*Id.* (21).

¹¹¹*Id.* (20).

¹¹²*Id.* (18).

¹¹³*Id.* (19).

¹¹⁴*Id.* (17).

¹¹⁵*Draft Convention, supra* note 1, art. IX, § 9.

¹¹⁶*Id.*

¹¹⁷*Id.* § 10.

¹¹⁸*Id.* § 11 (a)-(b).

¹¹⁹*Id.* § 20.

¹²⁰*Id.* § 11(c).

¹²¹*Id.* § 15.

Executive Council must also be given notice of the inspection, and may, by a three quarters majority of its membership, decide not to carry out the challenge inspection.¹²²

The Director-General must issue an inspection mandate, consisting of the inspection request put into operational terms, that governs the conduct of the challenge inspection.¹²³ The inspection team must conduct the inspection in the least intrusive manner possible.¹²⁴

3.1.3.1 Pre-inspection Activities. The inspected State Party must begin "securing the site" by compiling information of all vehicular activity at the inspection site within 12 hours after the arrival of the inspection team at the point of entry.¹²⁵ Upon arrival at the relevant perimeter, the inspection team itself is to begin monitoring vehicular traffic activity.¹²⁶ The team may also inspect vehicles exiting the site.¹²⁷ Personnel and vehicles entering the site and personnel and personal passenger vehicles exiting the site are not subject to inspection.¹²⁸ These procedures may continue for the duration of the inspection.¹²⁹

The inspected State Party must provide the inspection team with a pre-inspection briefing -- at which time the inspected State Party may indicate to the inspection team the areas, equipment, and documentation it considers sensitive and not related to the purpose of the

¹²²*Id.* §§ 16-17.

¹²³*Id.* § 18. The inspection request must, at a minimum, contain the following information: the state party to be inspected, the point of entry, the size and type of inspection site, the concern regarding possible non-compliance and the nature and circumstances of the possible non-compliance, and the name of the observer from the requesting State Party. Verification Annex, *supra* note 1, pt. X, B(4)(a)-(e).

¹²⁴*Draft Convention, supra* note 1, art. IX, § 19.

¹²⁵Verification Annex, *supra* note 1, pt. X, B(23). This information must be given to the inspection team and may include: traffic logs, photographs, video recordings, etc. *Id.* (24).

¹²⁶ *Id.* (25).

¹²⁷*Id.* (29). Such inspection will be conducted pursuant to the managed access procedures discussed *infra*.

¹²⁸*Id.* (30).

¹²⁹*Id.* (31).

inspection.¹³⁰ Based on this briefing, the inspection team must prepare a plan that specifies the activities to be carried out and the areas the inspection team wishes to inspect.¹³¹ This plan must be made available to the inspected State Party.¹³²

3.1.3.2 Inspection Activities. The inspected State Party must provide access within the requested perimeter within 108 hours after the arrival of the inspection team at the point of entry.¹³³ The concept of "managed access" is an important negotiation process to limit the scope of challenge inspections in order to protect national security.¹³⁴ In addition, the inspected State Party may restrict access by invoking its constitutional obligations with regard to proprietary rights or searches and seizures.¹³⁵ In no case, however, may a State Party use these restrictions "to conceal evasion of its obligations not to engage in activities" prohibited by the CWC.¹³⁶

3.2 THE RIGHT OF PERSONAL PRIVACY.

The right to personal privacy is universally respected. This right appears in the European Convention on Human Rights, the American Human Rights System, and the United Nations Norms and Standards. Article 12 of the United Nations Universal Declaration of Human Rights provides: "No one shall be subject to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation." Similarly, Article 17 of the International Covenant on Civil and Political Rights provides: "No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks of his honor and reputation."

3.2.1 Constitutional Protections in General.

Every country surveyed explicitly protects the right to privacy. In almost all countries, this protection is constitutionally expressed. Representative provisions include the Greek Constitution, article 9, section 1, subparagraph (b), which states: "Private and family life of the individual is inviolable." Article 2, section 1, also states: "Respect and protection of the value of the human being constitute the primary obligation of the state." In Russia, the

¹³⁰*Id.* (32)-(33).

¹³¹*Id.* (34).

¹³²*Id.*

¹³³*Id.* C(39).

¹³⁴*Id.* (41). *See Id.* (46)-(52) for the relevant managed access procedures.

¹³⁵*Id.* (41).

¹³⁶*Id.*

Constitution provides: "Everybody has the right to inviolability of his private life." The Brazil Constitution, article 5, section X, states: "The intimacy, the private life, the honor and the image of the people are inviolable." The German Constitution directly guarantees the inviolability of fundamental rights which have historically emerged from concepts of natural law and binds all three branches of the government to protecting them according to the Supremacy Clause.

In a few countries, the right to privacy is protected as if by a constitutional provision despite the absence of such expression. In Japan, while there is no constitutional provision that explicitly safeguards the right of the privacy, Article 13 protects individuals' right to life, liberty, and the pursuit of happiness; privacy is recognized as included in this right. The United Kingdom does not have a written constitution, but the right to privacy is protected by common law, the European Convention on Human Rights, and numerous Parliamentary Acts. In China, the right to privacy is protected through the criminalization of activities that infringe on this right.

Some countries restrict the constitutional right to privacy, although only for specified reasons. In Turkey for example, Article 13 of the Constitution states that the right to privacy may be restricted in order to: 1) protect the integrity of the state, 2) protect national sovereignty, 3) protect the Republic, 4) protect national security, 5) maintain the public order, 6) maintain public peace, 7) protect the public interest, 8) protect general morality, and 9) preserve public health. Such restrictions may not be contrary to "the requirements of the order of democratic community or used outside the purpose they are provided for."

3.2.2 Personal Privacy and Biomedical Searches.

Some nations permit biomedical searches (i.e., sampling of blood, urine, tissue, breath, etc.). In Morocco, police officers conducting investigations may use all means likely to aid in determining the truth. However, Moroccan scholars say that searches of such an intimate character should be used only as a last resort and under a Magistrate's direct supervision. In Hungary, Article 54 of the Constitution prohibits medical and scientific experiments on an individual without his/her consent. There are no restrictions on the technical means applicable to body searches, but strict limitations and preconditions apply to biomedical examinations and surgical techniques used to gain evidence from an accused, e.g., a doctor must be employed where surgery is necessary to gain evidence.

Other nations permit biomedical testing but only in specified contexts or pursuant to established procedures. In Czechoslovakia, the Code of Criminal Procedure regulates taking of blood or urine and other biomedical testing which may be conducted only within the framework of criminal prosecution. In Germany, "special government needs" may necessitate such intrusions such as people working with epidemic viruses; additionally, biomedical testing may be used during criminal investigations where necessary to find relevant facts. In the United Kingdom, the Police and Criminal Evidence Act of 1984 provides for taking intimate and non-intimate samples, but biomedical testing requires either the subject's consent or statutory authorization. In Iran, medical tests of criminal suspects

are authorized only under limited conditions, such as in cases of drunkenness. In Chile, a person must submit to bodily manipulation only in cases concerning vaccination and treatment of contagious diseases, although refusal to submit is not penalized. According to the Chilean reporter, an international treaty containing provisions compelling submission to body inspection, medical tests, etc., would be ruled unconstitutional.

Some countries prohibit most types of compelled biomedical testing. In Russia, newly-enacted article 39 of the Constitution provides: "Nobody can be subject to medical, scientific or other experiments without his consent." In Greece, Article 57 of the Civil Code protects every individual's right to privacy regarding one's body as part of the general right of personality. Similarly in Brazil, intimate body searches are illegal.

3.3 SEARCHES OF HOMES.

Searches of homes are generally authorized in the context of criminal law enforcement. Most countries share comparable standards for home searches: in the absence of consent or exigent circumstances, the police must have a warrant (or similar judicial approval) based on suspicion or a necessary law enforcement purpose.

3.3.1 Privacy of Homes.

The prohibition against unlawful governmental intrusion into the privacy of the home is perhaps the earliest and most widely respected component of the right to privacy. All international legal schemes which protect human rights have specific provisions that protect the privacy of individual dwellings. Most countries provide penal sanctions for invasion of this right. However, the protection afforded to homes is not absolute. Generally, searches of homes are allowed when a judicial officer has issued a warrant or during the commission of a crime or in an emergency.

3.3.1.1 International Standards. The most detailed formulation concerning searches of homes is provided by the European Convention on Human Rights, article 8, which specifies the prerequisites to justify an interference with the home's sanctity:

- (1) Everyone has the right to respect for his private and family life, his home and his correspondence.
- (2) There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder and crime, for the protection of health and morals, or for the protection of the rights and freedoms of others.

A government intrusion cannot be in accordance with the European Convention unless it has some basis in domestic law. That law must be sufficiently clear to give citizens notice of the conditions that empower public authorities to so interfere, and must serve one of the legitimate public purposes mentioned above. The most important requirement is that the interference be proportional to the search's motivating purpose. To assess proportionality, it is necessary to examine the restrictive conditions on the scope of the power to search, and an applicant's available remedies for failure to respect these conditions.

3.3.1.2 National Constitutional Standards. Nearly every country's constitution protects the inviolability of the home. For example, Egypt specifically provides in Article 44 of its Constitution: "Houses and dwellings have sanctity and inviolability. They may not be entered or inspected except by and in accordance with a judicial order accompanied with reasons justified by the law." The Japanese Constitution protects the right of all persons to be secure in their homes, papers and effects against entries, searches, and seizures except upon properly issued warrant that particularly describes the place to be searched and things to be seized. Article 39 of the Chinese Constitution declares that homes are inviolable and prohibits any unlawful search or intrusion. The United Kingdom, which does not have a written Constitution, lacks this written guarantee; however, English common law asserts that every unauthorized search and seizure amounts to an actionable trespass. Furthermore, the European Convention on Human Rights, including Article 8, discussed above, is applicable in the United Kingdom.

The definition of a home varies, although an individual's or family's principal dwelling is considered a home everywhere. Generally, the home's privacy protection extends beyond a person's residence. The international systems studied extend this protection to hotel rooms and other dwellings; whether business premises are also treated as "homes" is contested. Greek law interprets "home" to include residences as well as premises used for professional activities such as offices, factories, or workshops that are not freely accessible to the public. In Iran, a private home is understood to be any premises into which entry depends on the consent of the owner, including a house, an office that is not open to the public, or a factory or apartment having a guarded entrance. In Morocco, tents and caravans are also defined as homes. German law defines a home by the owner's desire for privacy: if the owner restricts accessibility to a space and dedicates it to being his center of life and activity, the protection of home privacy is triggered. By contrast, in Czechoslovakia, anything not used as a dwelling or adjacent thereto is not a home.

3.3.2 Legal Authority to Search Homes.

Most countries explicitly specify the permissible conditions for home searches. In Israel, a house search must be intended to secure an article that: 1) is necessary for the purpose of any investigation, or 2) which has been used for an illegal purpose. Entry under exigent circumstances is allowed only if, according to an officer's reasonable belief, a felony is being or has recently been committed. In the United Kingdom, this requirement is narrowed

somewhat by the specification that the crime must be a serious arrestable offense, and that other means of securing access to the evidence have failed or are likely to fail.

Brazil specifies eight purposes for home searches: 1) to arrest offenders; 2) to seize things found or obtained by criminal means; 3) to seize instruments of falsification or counterfeit objects; 4) to seize arms, munitions, and instruments used in crime; 5) to discover objects necessary as evidence of an infraction; 6) to seize letters, closed or not, sent to the accused person when there is suspicion that the discovery of its content can be useful to elucidate facts; 7) to locate victims of crimes; or 8) to obtain any evidentiary element.

Yet in some countries, the legal authority to search homes is not strictly specified. For example, in Czechoslovakia, a search is valid if based on a well-founded suspicion that there is evidence important for criminal proceedings or that a criminal suspect is hiding in the home. Entry is also allowed if necessary to protect life or health of persons, protect their rights and freedoms, or avert a threat to public security and order. In Germany, a home search must be purposefully aimed at finding persons, things, or facts that the addressee does not want to disclose or surrender. While a warrant is generally required, it may be issued without a hearing or avoided altogether in the event of exigent circumstances based on the imminent danger that the purpose of the search may be frustrated by the process of obtaining a warrant.

In many countries such as Hungary, Russia, and Iran, written authorization is required, but not necessarily from a judicial authority. The prosecutor decides whether to authorize an investigative search. In Japan, a warrant must be issued on proper grounds and it must name the place to be searched and the items to be seized. Each search and seizure must be made on separate warrants issued by a judicial officer.

In some countries where a warrant is required, statutory exceptions effectively consume the requirement. For example, in Turkey, the Code of Criminal Procedure requires a judicial order to search a dwelling but also permits the public prosecutor and police to exercise the same authority when delay is deemed to be disadvantageous. In some countries such as Italy and Morocco, law enforcement personnel may search homes upon reasonable cause without a warrant. In Egypt, specific provision is made for searches of a house or dwelling of someone who is not accused of a criminal violation. These searches are permitted only with a magistrate's order supported by justifying reasons. A recent court decision has substantially narrowed searches for exigent circumstances.

Some countries empower administrative authorities to search private homes for non-prosecutorial (i.e., public health) purposes. In Chile, the Public Health authorities can inspect homes. In Iran, officials of regulatory agencies and/or localities may search homes. In Mexico, the Constitution requires that a judicial authority issue a written warrant identifying the persons to be detained. Administrative authorities may visit homes only to verify compliance with sanitary and police regulations. They may demand exhibition of books and papers that are indispensable to prove compliance with fiscal provisions.

3.3.3 Restrictions on Home Searches.

Many countries restrict government searches of dwellings by requiring that the owner be present, limiting the time and scope of searches, and regulating forced entry.

3.3.3.1 Owner's Presence. Many countries require the presence of the owner, the possessor, or a representative during a home search. In Morocco, the head of the household or his/her representative must be present. In Brazil and Iran, the owner must be present; if unavailable, two witnesses must be present. A similar rule pertains in Hungary, except that if the person concerned is absent and has no representative, the authority shall appoint someone else to safeguard the individual's interests. In Czechoslovakia, in addition to an adult member of the household, a disinterested third party must be allowed to take part in the search. In Turkey, if the judge or public prosecutor is absent, two persons from the district organization or neighborhood must be present. Somewhat unique is Germany where the owner or a relative or a representative or a neighbor must be present, but an infringement of this norm has no legal consequences.

3.3.3.2 Limitations on Time and Scope. Numerous countries impose time limitations on permissible searches of homes. In Morocco, searches must be conducted between 5:00 a.m. to 9:00 p.m. Searches are permitted during similar hours in Germany and in Russia, except for cases that tolerate no delay. In Turkey, for a search at night, there must be a *flagrant delict* such that delay is deemed to be disadvantageous, or the search must be made to apprehend a person who escaped while in custody. In Brazil and Iran, searches must take place during the day, except in extraordinary cases or with the owner's consent. In France, a home search can only be conducted between 6:00 a.m. and 9:00 p.m., but a search started during the day may continue into the night. Article 59, paragraph 2 of the Code of Criminal Procedure, provides for exceptions and broadens the permissible timing of a search and seizure in specified circumstances.

Only a few countries specifically limit what may be searched within the home. In Mexico, the judicial order must clearly identify the objects to be seized which constitutes the express limits of the search. More typical is Czechoslovakia which allows searches anywhere, any time, within a home so long as the search is properly authorized.

3.3.3.3 Forced Entry. Some countries explicitly permit forced entry in the event that the home owner denies access. In Brazil, the law provides, on condition that the owner or a neighbor observes the search, that "the door shall be broken into and the entrance shall be forced; the use of force will be permitted against things existing within the house for the discovery of what is being demanded." This applies only during the day. If force must be used at night, notice must be given to the inhabitant. If this notice is not answered, all exits may be guarded until daylight when the doors may be broken down. In Iran, forced entry is permitted so long as a representative of the prosecutor is present. In Czechoslovakia, physical force may be used, if necessary, in a search pursuant to the Code of Criminal Procedure but not for administrative inspections.

3.3.4 Waiver and Consent.

In all countries, individuals may waive some of their rights. Property rights may always be waived. The right against unlawful search and seizure can be waived by the subject acquiescing to the search. In Chile, waiver of rights is specified in the Civil Code article 12. The right to refuse inspection of premises, body searches, or medical tests may be waived. However, the right not to testify under oath cannot be waived lest those who refuse to waive rights be adversely compared to those who waive. In Greece, a person can consent to an inspection of a facility; however, if s/he later objects to the inspection, it may not continue without judicial authority.

In the United Kingdom and Hungary, consent to a home search requires a written waiver. Furthermore, waivers that are too broad or apply regardless of circumstances are not allowed. In Brazil, individual rights may be waived, including the right to privacy, but silence cannot signify a waiver. In Iran, the victim's consent extinguishes the illicit character of an infraction of liberty, a violation of his/her private domain including the home, or even the disclosure of professional secrets. In Mexico, rights can be waived; otherwise, evidence from a search that contravenes legal restrictions is inadmissible.

In all nations, the procedure for waiver must demonstrate voluntariness. However, in some countries such as India, Israel, and Chile, no formal process or requirement exists for waiver. In Egypt, waiver can be either implicit or explicit; if the accused did not object to the violation of a right, s/he is deemed to have waived that right. In Turkey, consent is valid when: 1) a person has capacity to consent; 2) consent is disclosed; and 3) the intrusion is committed within the scope of the consent. Consent given after a right has been violated will not release the public official of criminal liability, but it will extinguish the individual's right to sue.

3.4 ADMINISTRATIVE INSPECTIONS OF COMMERCIAL FACILITIES.

In nearly all countries surveyed, entrepreneurial activity is a privilege rather than an entitlement. There is no inherent freedom of enterprise; all rights and freedoms exercised by entities are received from the state through the regulatory process. In most states, enterprises are regulated both according to their type of activity and to their corporate status. No state surveyed grants such rights and freedoms to legal entities without qualifications or limitations. Thus, a state's power over licensed entities is considerably greater in these nations than where all legal entities share *a priori* the same basic rights as natural persons that can be limited under defined circumstances, but not eliminated.

3.4.1 Extension of Privacy Rights To Legal Entities.

Nearly all surveyed nations provide that, for purposes of applying constitutional rights, commercial entities are "legal persons" which entitles them to the law's protections. Yet, some countries such as Greece, Israel, United Kingdom, and Iran, limit the applicable rights

of commercial entities to those which are not inherently personal in nature (i.e., a right to dignity, honor, and possibly the right to privacy). One variant is found in Mexico where individual rights are conferred upon "legal persons" only to the extent that they are necessary to protect the rights of individuals. Similarly in Germany, non-natural persons cannot be holders of fundamental rights except where these entities assist natural persons to realize their rights. In Greece, some scholars and courts opine that privacy rights accorded to homes do not extend to regulated industries, large factories, or industrial units; the reporter does not agree with this view.

The most notable exception to the general rule is India where fundamental rights, intended to limit state power, apply only to individuals. Commercial entities do not have constitutional rights, except for the right against self-incrimination. Rights extend only to individuals and in some instances only to citizens. In Italy, commercial entities only enjoy the right to hold property.

Only a few countries grant government facilities the same protections as persons or private entities. In Morocco, government entities have the same rights as other legal persons. In Iran, government or municipal agencies are considered legal persons. In China, corporations with limited liability and collectively owned enterprises are legal persons and are accorded constitutional rights.

In nations where state-owned facilities enjoy some rights, those rights usually are not inherently personal in nature. For instance, the United Kingdom, Czechoslovakia, and Italy do not extend the right against compelled self-incrimination to government facilities because that right can only apply to natural persons. Chile affords government facilities the full enjoyment of the right against unreasonable search and seizure, but the right to hold property is inapplicable since the government cannot expropriate property from itself. In Brazil, government facilities may or may not share the same rights as legal persons depending on the nature of the affected right. Finally, Mexico represents a hybrid of this formulation: persons at government entities enjoy the full complement of individual rights.

3.4.2 Separate Regulation of Administrative Inspections.

Many countries have established a system of administrative courts separate from the civil and criminal court system. The administrative courts, consisting of all tribunals leading up to the equivalent of the French "Conseil d'Etat," review acts of administrative officials (or the police acting in an administrative capacity). By contrast, the acts of "judicial police" are subject to the jurisdiction of the prosecutor and the courts in all legal matters going up to the equivalent of the French "Cour de Cassation." These two hierarchies are independent of one another, except where a Conseil d'Etat decision bears upon an issue within the competence of the Cour de Cassation which has the final and controlling authority. In many legal systems, however, executive branch decisions may not be reviewable. Since the executive branch will authorize most CWC implementation measures, there may be no review of such measures except by a lawsuit alleging an abuse of power or discretion.

Most nations apply this dual system to distinguish "administrative" inspections from "penal or judicial" inspections. For example, Moroccan law provides for separate administrative and judicial police. The primary objective of the administrative police is to prevent violations of administrative regulations. The judicial police, by contrast, intervene after a crime is committed. The extent of the investigators' powers varies depending on the task's nature and goals. German law also recognizes a distinction between "criminal" and "administrative" enforcement, but administrative enforcement may be subdivided into a regime to prevent dangers from occurring and one which deflects threats that have already materialized.

Of the nations that distinguish between these two types of inspections, most agree that administrative inspections are less restricted and must satisfy fewer prerequisites. In Mexico, criminal searches face more legal obstacles than administrative inspections which serve the public interest. Similarly in Czechoslovakia, criminal investigations of premises are distinct from administrative searches for the purpose of inspection and control. The former are subject to far more detailed regulations than the latter. Physical force may be used, if necessary, in a search pursuant to the Code of Criminal Procedure but not for administrative inspections. Administrative inspections cannot interfere with the rights of individuals to the same extent as criminal investigations. In Brazil and Italy, the scope of official discretion is broader for administrative inspections than for prosecutorial inspections. France follows this general rule; however, whether administrative inspections which have non-criminal sanctions must obey the same conditions and guarantees as criminal inspections is unclear.

A typical distinction between these two types of inspections is that most countries grant more intrusive powers to criminal inspectors. Egyptian law distinguishes between inspections for penal purposes and those that monitor compliance with health and safety standards. A search to seize criminal evidence encompasses both a place and its contents. Administrative searches are limited to physical entry of a site to examine its interior without scrutinizing its contents. Entry by administrative agents is not an investigative act, but is limited to activities necessary to monitor compliance with the law. In Hungary, criminal investigations have more serious consequences than administrative inspections. The former are more intensive, and inspectors have more discretionary authority; however, more rights are guaranteed.

Russia and Chile are somewhat unique. The Russian Code on Administrative Transgressions does not distinguish, with respect to the scope of inspectors' powers, between collecting criminal evidence and monitoring compliance with prescribed standards. The permissible scope of inspection is the same, but administrative officials generally are not authorized to initiate criminal proceedings. In Chile, there are no formal distinctions between the nature of judicial and administrative inspections, their scope, and the discretion of inspectors, but the rules for performing each type of inspection are different.

3.4.3 Purposes for Administrative Inspections.

Various justifications exist for subjecting industries to administrative searches. The most often cited justifications include the promotion of public health, taxation and fiscal matters, safety, security, and morality. In Morocco and Greece, inspections verify compliance with laws protecting labor conditions. Several countries allow inspections of commercial facilities to prevent fraud in trade. Brazilian authorities, exercising the state's police power without judicial intervention, may routinely inspect any legal person engaging in commercial activity. In Egypt, almost all industries are subject to numerous regulatory inspections for various purposes, including monitoring and supervising the correct execution and compliance with the laws. In Turkey, all industries operating under the authority of a permit are subject to warrantless inspections which can result in the withdrawal of the permit at any time. Israel, Turkey, and Brazil recognize a right to commercial activity that regulators may not unduly interfere with, subject to a broad exception for protection of public health, welfare, and the *ordre public*.

As cited by Chile, Egypt, Iran, India, Italy, Morocco, Mexico, Turkey, United Kingdom, and Japan, the most common reason for administrative inspections is to protect public health. The Chilean Code on Public Health empowers health authorities to inspect any place, public or private, with the help of police if necessary. Officials may regularly inspect anywhere radioactive materials, chemical substances and pharmaceuticals are manufactured, stocked, or handled. Judicial redress is available only when applicable regulations are not properly observed. In Iran, public health regulations authorize the Organization of Public Health agents to inspect all public facilities, from medical centers to places of public accommodation such as restaurants. In India, the Factories Act renders all legal entities subject to routine health and safety inspections. In Japan, the Food Sanitation Law authorizes searches of businesses to inspect food and apparatus.

Industries that pollute or impact the environment are widely subject to regulation and inspection. In Russia, pursuant to a recently enacted law "On Environment Protection," all industries are subject to regulatory inspections. Specially authorized state bodies of the Russian Federation in charge of environmental protection have full authority to monitor compliance. In India, the Environment Protection Act of 1986 authorizes scheduled and unscheduled inspections of all establishments. Mexico's recently enacted General Law on the Ecological Equilibrium and Protection of the Environment provides broad authorization to conduct inspection. While the procedures for conducting such inspections are set out in detail, their frequency is unlimited, there is no requirement of a judicial order, and the owner of the facility is under an obligation to allow access to the places subject to inspection. In the United Kingdom, the Environmental Protection Act of 1990 confers broad powers on inspectors to enter premises at any reasonable time. Upon entry, an inspector may perform necessary operations, including requiring persons to give information.

Numerous countries require inspections of facilities that handle hazardous substances. Brazil's Ministry of the Army oversees regulation of industries that trade in controlled

substances, chemicals, and warlike material. Similarly, Chile regulates radioactive materials, toxic and hazardous wastes, chemical labs, pharmaceuticals, and narcotics. In Japan, Article 68, Paragraph 5 of the Nuclear Substance and Nuclear Reactors Control Law, enables international inspectors in the presence of Japanese officials to enter business entities to inspect books and records, ask questions of personnel, and collect samples.

Notably, industries related to arms production and defense may be subject to inspections. In Czechoslovakia, a special control regime governs technologies and chemicals used in the production of chemical weapons. The regime controls the import, export, and other treatment of these technologies and chemicals as well as their disposal, sale, movement, change in use, and liquidation. It is illegal to import controlled goods that are to be used for military purposes; exports are also under the regime's control. Customs agencies conduct on-site inspections to ensure that the control regime is followed. In Iran, arms or defense industries are subject to strict controls due to their national security implications. In Italy, a 1931 statute permits warrantless inspections of "homes or government or privately-owned facilities" to search for "chemical weapons." In the United Kingdom, facilities producing biological weapons and radioactive materials are subject to inspection, as are nuclear power facilities. Israel also exercises tight control over CWC-related industries. Turkey regulates industries that produce weapons and munitions.

3.4.4 Legislative Authorization for Administrative Inspections.

Most states have enacted explicit statutes empowering agencies to conduct administrative inspections, although national constitutions typically do not specify a requirement that inspections be so authorized. In Greece and Turkey, legislation must delimit the conditions and procedures for a search or seizure at a facility and enumerate inspectors' powers. India explicitly requires a statute to authorize a search and seizure. In Italy, inspections for health, safety, economic, or fiscal reasons must be authorized by statute. Mexican law specifies administrative procedures that provide constitutional protections comparable to those applicable to home searches. In Turkey, legislation must enumerate the powers vested in inspectors and must set out, in detail, the procedures to be followed.

France is noteworthy for the degree of constitutional specification applicable to administrative inspection schemes. According to article 66 of the Constitution, a law authorizing inspections must provide that: (1) the magistrate empowered to authorize the search cannot do so without a special ordinance, (2) the magistrate must review the nature of the requested search, (3) the search must take place in the presence of an officer of the judicial/legal police, (4) this magistrate can terminate the search at any time, which implies the right of review.

In a few countries, there exist no *a priori* standards -- inspections are authorized on an industry-by-industry basis. In the United Kingdom, inspection of a government owned facility need not be authorized by legislation; however, inspection of private industry must have statutory sanction. In Israel, only the terms of the authorizing legislation define the

scope of inspections. In Japan, there is no uniform statute which details specific administrative inspection procedures. Therefore, each administrative statute sets the procedures to govern their particular actions.

In most countries, regulatory statutes specify some procedures that inspectors must observe in conducting authorized activities. Greek laws give inspectors a broad range of authority but strictly require inspectors to protect trade secrets. Moroccan law authorizes inspectors to enter establishments freely without prior notice, but authorizes a judicial remedy for injuries in the event that inspectors exceed their delegated powers. In Italy, law enforcement personnel have broad, nearly unfettered discretion for administrative inspections of commercial facilities for matters concerning health or safety. In Egypt, since administrative inspections do not violate individual liberties, rights to privacy, nor the sanctity of homes, the administrative authority has discretionary power to determine when, where, or whom might be inspected. In Japan, the Supreme Court has held that when an administrative statute does not enumerate the scope, degree, time, and place of questioning and inspection, it is within the inspector's reasonable discretion.

In Czechoslovakia, the criteria for administrative inspections are defined in the Constitutional Charter and the Code of Administrative Procedure:

- (1) Administrative enforcement must be provided for by law and not exceed the limits and restrictions on fundamental rights and liberties set out in the Charter;
- (2) Administrative enforcement must be proportional to the protected interest and the goal pursued; and
- (3) The principle of least restrictive means applies: the administrative body must use the most moderate means of enforcement possible to achieve the ends sought.

In a few states, legislation must specify appropriate procedures if the inspections it authorizes may transgress the rights of inspectees. In Chile, the reporter believes that the Constitution gives the legislature broad authority to limit fundamental rights. The inspection procedures set out in the statute authorizing the inspection must be strictly followed. The owner must have notice and the opportunity to be present; the inspection must create the least possible disturbance; a record must be made of the procedure; a list of objects seized must be made; and a receipt for such given to the owner. Failure to comply with the procedures has the same consequences as failure to adhere to a judicial order in the criminal context; the inspectee has a right to a legal remedy for any injury.

A few countries require less oversight of administrative agencies. In Brazil, agencies are empowered to enact their own regulations and sanctions without action by congress if a statute so authorizes. Similarly in China, the State Council may issue a document as notice of commencement of inspections and organize inspection teams to execute that decision.

3.4.5 Initiating Inspections of Commercial Facilities.

The determination of when and which commercial facilities are to be inspected differs from country to country. Some nations restrict the timing and frequency of inspections. Some impose warrant/notice requirements that regulate the discretion of inspectors.

3.4.5.1 Timing and Frequency of Inspection. In most of the countries surveyed, administrative officials determine the frequency of inspections. In the United Kingdom, the inspectorate develops a general enforcement plan based on the regulated industry's conduct. However, the inspectors themselves determine the frequency of the inspections. In France, the Constitution, laws, decrees, and jurisprudence determine who can carry out a search and seizure, its place, its time, and the methods used. In Morocco, police officers and agents commissioned by the Ministry of Public Works are authorized to enter establishments at any time to make any observations they deem necessary. In Egypt, the administrative authority determines where and when inspections will take place. The statutory authority in India is likewise responsible for determining the frequency of inspections.

In many countries, inspections may be conducted at almost any time. A Greek statute authorizes anywhere, anytime inspections of a regulated facility. China also authorizes inspections for any purpose, at anytime, of state-owned or collectively-owned enterprises. In Italy, health and labor inspections can be conducted anywhere, anytime. Turkey permits inspections of regulated industries when necessary. Somewhat distinctive is Iran, where inspections may not be conducted at night nor without the owner's presence.

3.4.5.2 Warrant/Notice Requirements. In some countries, an inspection cannot proceed without a warrant or order. In France, a search and seizure must be supervised and authorized by a judge only if it threatens an individual's liberties. The French reporter expressed concern at the possibility of warrantless verification inspections that infringe citizens' constitutional right to privacy finding it absolutely impossible to reconcile with constitutional protections. Therefore, the CWC should be amended to include a requirement that nonconsensual inspections be authorized by a warrant and conducted in the presence of a judicial police officer.

In some countries where a warrant is required, however, such document need not be ordered by a court. Morocco requires strict adherence to the order authorizing the inspection of private and state-owned facilities, but this order apparently need not be issued by a court. Czechoslovakia also requires a warrant that may be issued by a prosecutor or investigator. An administrative inspection in Russia may proceed at the discretion of the inspector or procurator but does not require a warrant or judicial authorization. In India, administrative inspections may be authorized by competent administrators but do not require judicial authorization. In Mexico, inspectors, to secure a warrant from a "competent authority," must specify the places to be searched and items to be seized. If an inspection is to take place in a public building, the person in charge of the building must be notified at least an hour in advance, except in emergencies.

In some countries, a warrant is required only in limited circumstances, or is generally required but subject to numerous exceptions. In Egypt, a warrant is required only if an inspection is intended to discover evidence of a crime. In Israel, a warrant may be, and often is, legislatively required unless there is a real possibility that obtaining a warrant would frustrate the aim of the search. In the United Kingdom, whether a warrant or judicial permission is necessary depends entirely on the legislation authorizing the inspection. Moreover, "on-the-spot" inspections may proceed without prior legal or administrative proceedings. In Japan, there is no general warrant requirement for administrative inspections. However, a warrant may be required under certain circumstances (e.g., when the administrative inspection could lead to a criminal investigation).

In many countries, no warrant is required if the inspected party is given notice and/or can refuse the inspection. In Turkey, authorized personnel can conduct inspections of licensed industries without judicial permission. No advance notice is required because it would defeat the inspection's purpose. However, inspections of "public organizations" and unlicensed businesses require an order for inspection issued by the "government." As a result, where there is no warrant, the facility has the constitutional right to refuse the inspection. In Hungary, the public prosecutor is empowered to inspect documents and premises to determine an enterprise's compliance with statutes and regulations. The Registration Court and professional associations also determine compliance with relevant standards. No warrant is required if there is just cause, but notice is required unless it would frustrate the purpose of the inspection. In Chile, a court decree is necessary to perform most searches. However, a decree of the health authority suffices to order administrative searches and seizures of any closed building or place so long as "just cause" justifies the inspection. The owner must have notice of an inspection and the opportunity to be present during the search. If no one is present, written notice of the inspection must be left. In addition, minimal notice to local authorities should precede a "surprise" inspection.

In a few countries, a warrant is not necessary to conduct an administrative inspection. In China, it is not necessary to obtain a warrant, judicial permission, or follow legal or administrative procedures. In Iran, the official responsible for inspections can conduct them without a warrant when s/he deems appropriate. In Greece, no warrant is required to conduct administrative inspections, but there must be reasonable cause or suspicion to believe the facility is subject to regulation. Inspectors must present an identity card before initiating an inspection.

3.4.6 Carrying Out Inspections.

Once an inspection is officially authorized, it must be carried out according to proper procedures. Proper inspection procedures in the surveyed nations include requirements as to: participants in inspections, questioning of personnel at inspected locations, searches of documents and commercial records, areas that are considered "off-limits," and procedures defining when property can be seized during an inspection.

3.4.6.1 Participants in Inspections. Inspections must be officially supervised in most countries. In Egypt, administrative inspectors assume the role of judicial police officers and may enter facilities to verify compliance with the law. In Greece, a judicial officer must accompany inspectors in cases where the facility owner refuses to consent to an inspection. In all other cases, it is unclear whether regulatory inspections require the presence of a judicial officer. In Hungary, the public prosecutor monitors adherence of private facilities to regulations. In Chile, if the health officials so request, the police must assist in health inspections by following the authorizing decree. The police may assist with inspections in Mexico if requested. In Brazil, the administration can demand the assistance of the public force in order to verify compliance with its regulations. In France, an administrative search must be judicially controlled through the participation of a police officer or magistrate. Also, article 57 of the Code of Criminal Procedure details what witnesses must be present.

3.4.6.2 Questioning of Personnel. The Greek statute authorizes administrative inspectors to question personnel. In Czechoslovakia, persons at "controlled" facilities must give necessary oral or written information and explanations. However, a conflict may occur between the right of inspectors to request explanations from a "controlled" facility's employees and the constitutional right against self-incrimination. While potential offenders do not, as a rule, refuse to testify, this conflict cannot be resolved under current constitutional doctrine. In Hungary, administrative agents may ask for information from the facility owners and their representatives. In Japan, an administrative statute can authorize the inspector to question personnel. For example, under the Fire Service Law, the fire inspector is authorized to order a person concerned to submit information or request him/her to make a report so long as the need for the information is balanced with the interests of the person subjected to questioning.

3.4.6.3 Inspections of Documents and Commercial Records. Documents, books, and records can all be inspected under the Greek statute. Samples can also be taken. In Hungary, the public prosecutor is entitled to inspect documents during inspections in order to verify compliance with regulatory norms. Sampling is allowed in Italy. In Russia, the right to inspect documents is reserved only for tax inspection. In Japan, as above, an administrative statute can authorize the inspections of documents and commercial records. For example, under the Food Sanitation Law, an inspector can inspect not only the business installation but also its records and books. In Czechoslovakia, inspectors may enter premises and review necessary documents and, in exceptional cases, secure original documents and take samples of products or goods. However, a new statute limiting law enforcement personnel specifies that regulatory inspectors cannot, unless statutorily authorized: 1) eavesdrop or wiretap; 2) stop and open mail; 3) seize things or take samples; 4) conduct "personal" searches; and 5) search vehicles. In addition, inspection of facilities that contain State secrets may be conducted only by persons authorized to learn such secrets.

3.4.6.4 Areas of a Business Considered "Private" and Off Limits To Inspectors. In Egypt, an officer's right of entry into public places or businesses does not extend to areas that are not open to the public (i.e.; the manager's bedroom). Similarly, officers do not have

the right to enter at times when the business is not open to the public. In Iran, the area of a search is limited by the requirements and subject of the search as determined by the official who orders the search. In Morocco, public places like restaurants, cinemas, and night clubs can be visited when they are open; when they are closed, they are treated as private homes. The parts of these establishments that are clearly reserved for personal use are considered private.

3.4.6.5 Property That May Be Seized. In nearly every country, the scope of the search defines the items that may legitimately be seized. For example, in Morocco, the objects and documents likely to serve as evidence may be seized. These seized objects must be maintained intact so far as possible for their owners or legitimate holders to reclaim. In Japan, the administrative statute can authorize the taking of samples. For example, under the Food Sanitation Law, an inspector is authorized to collect samples of food, apparatus, container-package offered for sale or used for business. In France, a seizure can include all objects useful to demonstrate the truth so long as: (1) the objects seized are inventoried; (2) the inventory is placed under seal; and (3) the articles seized and the inventory are taken to the court's storage area.

3.4.6.6 Consequences of Refusals to Cooperate. Failure to cooperate with an administrative inspection can carry civil or criminal penalties. In Turkey, resisting a state inspection is punishable under the criminal code and under the authorizing legislation. The Turkish reporter strongly urges penal sanctions for those who refuse to comply. In Egypt, all commercial industries must obtain a license which can be revoked for violation of the law. In Mexico, the owner of an inspected facility is "obligated" to allow the inspectors access to the facility and to the information they seek, but not to confidential industrial secrets. In Czechoslovakia, an unjustified refusal to give necessary oral or written information may be grounds for a fine. In Japan, each administrative statute details the penalty for failure to comply with an inspection. For example, under the Food Sanitation Law, a party who refuses to comply may be subject to fines.

3.5 LEGAL REMEDIES FOR IMPROPER INSPECTIONS.

It is widely agreed that courts can review the constitutionality of administrative inspections. However, the legal basis for a suit and the proper tribunal to hear it vary greatly. In Czechoslovakia, only specifically enumerated state organs can challenge the constitutionality of administrative inspection laws before the constitutional court. An individual may indirectly challenge an administrative law, executive decision, or other exercise of public power as a violation of the constitution or an international treaty on human rights. However, even if the constitutional court recognizes a violation of rights and prohibits the intrusion, this does not affect the validity of the law.

In Chile, an administrative inspection cannot be challenged on general constitutional grounds, but inspections might be challenged as to whether they comply with legal formalities, such as:

- (1) The order of inspection has been issued by an authority that is not legally entitled to do so;
- (2) The order has been issued by a proper authority, but not in the cases and circumstances set forth in the law, or it has acted outside its field of competence;
- (3) The inspection has actually been carried out without observing the legal requirements for such cases.

In Russia, Articles 266-276 of the Code of Administrative Offenses allow a suit against the actions of inspectors. The Law on the Manner of Appealing in Court Against Unlawful Actions of Officials and State Bodies Infringing upon the Rights of Citizens (1989) empowers the courts to review the actions of officials. While these protections do not explicitly cover entities other than persons, the courts sometimes extend them to private commercial facilities. In China, if the government's administrative acts exceed the authority delegated by the NPC or the SCNPC, then a suit for abuse of power can be brought.

3.5.1 Injunctive Relief.

An injunction is a court order prohibiting someone from doing some specified act or commanding someone to undo some wrong or injury. Injunctions are unique to common law systems. In civil law systems, an equivalent kind of relief may be obtained by having a court annul or provisionally suspend the operation of administrative act or order. For simplicity's sake, the term "injunction" refers to any judicial order to stop an activity.

In some of the countries surveyed, an injunction may be issued to prevent an administrative inspection. In Israel, an injunction is allowed as long as there is no law that prohibits it. In Chile, an injunction can only be issued before an inspection occurs; injunctive relief can not apply to an entire program. In Japan, the Administrative Litigations Law allows a party to ask that an inspection be revoked and suspended. In France, a legal judge and a properly authorized administrative judge can stop an inspection, declare it illegal, neutralize its effects, or compensate for any damages. In Germany, as soon as an objection or a suit is filed before an administrative authority, administrative operations are automatically suspended, subject to three exceptions: (1) where the activity is immediately enforceable in the public interest, (2) where a federal law so provides, or (3) where police enforcement cannot be delayed. Yet, even these exceptions may be judicially reviewed, and a court may enjoin execution of an administrative act.

A number of countries recognize an abstract right to an injunction, but to grant an injunction would be impractical in the CWC context. In Czechoslovakia, under Article 6 of constitutional law no. 91/1991 sb., the constitutional court can issue an injunction against an inspection which threatens an individual's rights. However, a Czech court could not practicably issue an injunction against a CWC inspection given the CWC inspection's short period of notification and conduct. Similarly in Turkey, if any inspection infringes any right, the injured person or enterprise may ask the Administrative Court to suspend or annul the

inspection warrant. The inspection can be enjoined if it will cause damage that would be impossible or difficult to indemnify. However, this type of injury is hard to foresee, and therefore, the injunction will not be granted in the vast majority of cases.

In Iran, the only way to prevent an administrative inspection is by appeal to the Court of Administrative Justice (CJA). The conditions for such an appeal are as follows: (1) the public authority must issue a warning concerning the inspection; and (2) the enterprise must have time to address the CJA and request its intervention. Normally, however, this process is too lengthy and, since administrative inspections are done on short notice, it will be impossible for an interested party to prevent the inspection. In Hungary, a suit seeking an injunction against inspections may be instituted in the administrative court which is empowered to invalidate the administrative decision to proceed with the inspection.

In other countries, it is not possible to obtain an injunction against administrative inspections. In China, the courts have no power to issue injunctions. In the United Kingdom and India, as long as the implementing legislation fully provides procedures and remedies, injunctions are excluded. In Russia, it is not possible to obtain injunctions to prevent administrative inspections. In fact, current legislation does not envisage the possibility of judicial interference to prevent official action that might infringe on a citizen's rights or interests.

3.5.2 Liability for Improper Inspections.

3.5.2.1 Personal Liability of Inspectors. In some of the countries surveyed, inspectors may be held criminally liable for violating inspection procedures. In Chile, failure to follow statutory provisions could result in the criminal prosecution of the offending official. In Turkey, inspectors who disclose business secrets or who occupy, completely or partially, a place of business may be criminally liable. In Iran, if an inspector exceeds the limits of his authorization, he is personally liable to the victim, as well as potentially criminally liable.

3.5.2.2 State Liability. Every country provides that the government must pay damages for injuries resulting from an improper inspection or an abuse of power. In Italy for example, individuals and commercial entities can sue the government whenever law enforcement personnel are without authorization to conduct the inspection, lack proper cause, violate protected rights, or illegally enter protected areas. In Japan, the State Redress Law provides that state or local public entities must compensate injured parties when an official causes damage. In Germany, the tort liability of the state is based on the principle of fault: the state is liable for the acts of anyone exercising a public duty the same way a corporation may be liable for the acts of its agents or officers. Whether a particular behavior qualifies in this regard depends on whether the specific purpose for which the person was engaged amounts to a sovereign activity.

In France, the state can be responsible for damages resulting from the application of its laws even without finding official fault or illegality. State responsibility is implicated if an

inequality arises between citizens in the application of a law. However, any indemnification requires the existence of three severe conditions: (1) the injury suffered must be abnormal; (2) the injury must be particular (i.e., concern very few persons); and (3) the law must not be able to be interpreted as having meant to exclude indemnification of damages.

In most countries, such as the United Kingdom, Egypt, Italy, Mexico, and Russia, damages are assessed on a compensatory basis for actual losses including lost profits, but compensation is not available for "immaterial," "moral," or "punitive" damages. For instance, in Czechoslovakia, an injured person may claim both the actual damages and lost profits resulting from an improper administrative decision. However, the state will not pay compensation for non-property detriment such as is given in private suits for damages caused to reputation or to the right of privacy.

Most reports do not identify how damages may be calculated in the specific context of an illegal search. In Brazil, when it is not possible to determine the amount of damage caused, civil liability will consist of paying an indemnity established in money. In Turkey, if a citizen suffers injury as a result of treaty enforcement, s/he can pursue legal remedies. This includes actions when:

- (1) any pecuniary, procedural, or administrative right is infringed during any search;
- (2) any private property is unlawfully seized, damaged, or destroyed.

Suits may be brought seeking pecuniary and intangible damages.

In most countries, the state need only pay damages if the injury was caused by an action contrary to law. In some countries, if administrative regulations are improperly executed, legal consequences will ensue if property is damaged or lost during an inspection. In Russia, if illegally performed administrative acts violate an owner's property rights, the losses suffered, including expected profits, shall be fully reimbursed. Furthermore, state interference with an enterprise's activity is impermissible, except as the law allows. An enterprise is entitled to ask a court to declare the acts of administrative bodies and the decisions of state officials null and void. If an enterprise complies with administrative orders which conflict with national legislation or are inappropriately executed, then losses suffered by the enterprise, including expected profits, shall be reimbursed. Similarly in Hungary, administrative activities may lead to damages, although it is uncertain whether actual damages can be caused by infringing procedural rules relating to search or seizure.

While the seizure of property in the context of a legitimate search will not have legal consequences, damages may be awarded if the seizure was excessive or the search itself was improper. In Israel, there may be an action to compensate for losses caused by negligent searches, seizure of property, or destruction of property. In Egypt, if a government inspection results in property damage or destruction, the injured party may sue to: 1) compel

the government to pay damages to compensate for the actual harm done and the profits lost during the illegal taking or 2) have the property restored to its rightful owner.

3.6 NEW LEGISLATIVE AUTHORIZATION FOR CWC INSPECTIONS.

Many reporters, having reviewed the CWC inspection provisions in light of their national legal systems, identified potential legal difficulties concerning the source of authority of CWC inspectors as well as the apparently unrestricted power these inspectors would possess. These reporters contend that their nation should enact broad legislation in order to effectuate verification inspections. For example, the Chilean reporter urges that the possibility that the CWC might be declared unconstitutional by the courts could be addressed by a domestic statute vesting the international inspection team with the same rights to inspect and search currently exercised by Chilean health authorities.

Both the Turkish and Hungarian reporters were concerned that the CWC provisions concerning the inspection of private commercial enterprises are insufficient to pass constitutional scrutiny. In Turkey, that warrantless administrative inspections of unlicensed facilities are generally proscribed means that a facility or individual might deny access and sue for abuse of power. Therefore, the CWC should require the Turkish government to give inspectors clear and precise warrants and provide a penal sanction for those who do not comply. In Hungary, in order to make CWC inspections constitutional, legislation must specify that inspectors have the following powers:

- (1) to enter the inspected area,
- (2) to inspect documents,
- (3) to observe work activities,
- (4) to ask for information, and
- (5) to initiate legal action against offenders.

The Indian reporter indicated that the CWC's failure to compel individuals to consent to a search or to require punishment of those who refuse to cooperate may cause problems in its enforcement. This reporter suggests that the CWC require national implementing legislation that obliges facilities to consent to inspections. Furthermore, this legislation should require documentation of the reasons for granting an inspection so that there will be a basis for judicial review. Specifically, the legislation should enumerate:

- (1) public policy objectives to be achieved by inspections,
- (2) specific powers to order inspections,
- (3) prescriptions of occasions/grounds on which inspections may be granted (under Article 14 of the Constitution, a *carte blanche* delegation of power to administrative authorities would be outside the permissible limits of delegable power and arbitrary.)
- (4) procedures for a competent authority to promulgate orders,

- (5) description of minimum control over discretion to order 'challenge' inspections,
- (6) specification of private commercial facilities' compliance duties,
- (7) provisions for civil and/or criminal sanctions for non-compliance,
- (8) clauses to exclude judicial recourse,
- (9) administrative review mechanisms to monitor, rectify, and recompense facility owners for abuse of discretion or violation of procedures.

Some reporters urged that legislation make resistance to CWC inspections a criminal offense. The Russian reporter suggests enactment of legislation similar to the Code of Administrative Offenses which allows for detention of individuals for up to three hours without a warrant. According to the Brazilian reporter, even though implementing legislation is only mandated where a treaty contains provisions requiring adoption of certain rules (i.e., criminalization of a particular act), the CWC should be accompanied by model domestic legislation that would criminalize conduct prohibited by the CWC and regulate inspections, thereby minimizing conflicts between the inspectors and facility owners.

SECTION 4

INTERFERENCE WITH PROPERTY RIGHTS

CWC enforcement may cause property losses in at least three different contexts. First, property may be confiscated or its forfeiture compelled, without material compensation, as a sanction for the owner's illegal activity. Second, property may be acquired through a "taking" or nationalization. Third, a trade secret may be disclosed.

In the United States, the Fifth Amendment guarantees that one whose property is taken by the government is entitled to be compensated for the fair market value of the loss.¹³⁷ A taking of property, including intangible property such as trade secrets, may occur by direct government seizure or by destruction of its value.¹³⁸ Compensation for property that the government has taken is obtained by suing the federal government for damages.¹³⁹

4.1 RELEVANT CWC PROVISIONS: PROPERTY PROTECTION.

The provisions of the CWC which would protect trade secrets are found mostly in the Annex on the Protection of Confidential Information¹⁴⁰— which governs the verification activities at both civil and military facilities. To protect confidential information, the Organization must require only the minimum amount of information necessary to carry out its CWC responsibilities.¹⁴¹ Toward this end, the Organization must develop agreements and regulations which specify the information to which State Parties must give it access.¹⁴²

¹³⁷The Fifth Amendment reads in pertinent part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONST. amend V.

¹³⁸Ruckelshaus v. Monsanto Co., 476 U.S. 986 (1984).

¹³⁹The owner would be entitled to recover damages under the Tucker Act, 28 U.S.C. § 1491.

¹⁴⁰See Draft Convention, *supra* note 1, Annex on the Protection of Confidential Information.

¹⁴¹*Id.* A(1)(a). Inspections are also under an obligation to request only that information which is necessary to fulfill their mandate. Inspectors are prohibited from making records of information not related to CWC compliance. *Id.* B(8).

¹⁴²*Id.* A(1)(c).

The primary responsibility for protecting confidential information falls upon the Director-General of the Technical Secretariat, who must establish a stringent regime to govern the Technical Secretariat's handling of such information.¹⁴³ The CWC denotes information as confidential if: 1) the State Party so designated it, or 2) in the Director-General's judgement, 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.¹⁴⁴ The level of sensitivity of confidential data is to be established based upon uniformly applied criteria.¹⁴⁵ These criteria must be included in a classification system that will categorize confidential information.¹⁴⁶

The appropriate unit of the Technical Secretariat will evaluate whether information contained in various documents submitted by State Parties contains confidential information.¹⁴⁷ No information received by the Organization in relation to CWC implementation will be published or released except in the case of narrow exceptions.¹⁴⁸ Confidential information will be securely stored at the premises of the Organization or, in some cases, in the office of the National Authority of a State Party.¹⁴⁹ To the greatest extent possible, information must be handled and stored in a manner that precludes the identification of the facility to which the information pertains.¹⁵⁰

¹⁴³*Id.* (2).

¹⁴⁴*Id.* (a)(i)-(ii).

¹⁴⁵*Id.* (d).

¹⁴⁶*Id.* This classification system will be developed by the Preparatory Commission.

¹⁴⁷*Id.* (b). Such documents include: initial and annual reports and declarations, general reports on verification activities and other information provided in compliance with the treaty. *Id.* (i)-(iii).

¹⁴⁸*Id.* (c). The exceptions are: 1) general information on the implementation of the CWC; 2) information released with the express consent of the State Party to which the information refers; and 3) confidential information released by the Organization pursuant to agreed procedures which ensure that release only occurs in strict conformity with the needs of the CWC. *Id.* (i)-(iii).

¹⁴⁹*Id.* (e).

¹⁵⁰*Id.* (f).

When a State Party receives information from the Organization, it must treat that information according to the level of confidentiality established by the Organization.¹⁵¹ If requested, a State Party must provide details relating to its handling of the confidential information.¹⁵²

Finally, some provisions relating to sampling procedures may also afford some protection to trade secrets. Where sampling must be conducted off-site during either routine or challenge inspections, the Director-General is responsible for the security, integrity, preservation, and confidentiality of the samples.¹⁵³ S/he must establish a stringent regime for the collection, handling, transport, and analysis of samples.¹⁵⁴ S/he must also certify the laboratories designated to perform certain types of analysis and oversee the standardization of procedures and equipment at those laboratories.¹⁵⁵ The Technical Secretariat must account for samples, and unused samples or portions thereof must be returned to the Technical Secretariat.¹⁵⁶

Employees of the Organization are subject to strict control as to access to and handling of confidential information. The Organization must ensure that its staff members and inspectors meet the highest standards of competence and integrity.¹⁵⁷ Confidential information will be disseminated within the Organization on a need-to-know basis.¹⁵⁸

Each position in the Technical Secretariat must be governed by a formal position description that specifies the necessary access to confidential information.¹⁵⁹ The Director-General, inspectors, and other staff members are under a strict obligation not to disclose any confidential information which they have acquired in the course of their duties.¹⁶⁰ Inspectors

¹⁵¹*Id.* (4).

¹⁵²*Id.* This requirement echoes *Draft Convention, supra* note 1, art. VII, § 6.

¹⁵³Verification Annex, *supra* note 1, pt. II, (E)(56).

¹⁵⁴*Id.* (a).

¹⁵⁵*Id.* (b)-(c).

¹⁵⁶*Id.* (57).

¹⁵⁷*Draft Convention, supra* note 1, Annex on the Protection of Confidential Information, A(1)(b).

¹⁵⁸*Id.* A(2)(h).

¹⁵⁹*Id.* B(6).

¹⁶⁰*Id.* (7). This obligation continues even after the termination of their functions. In addition, staff members are required to enter into individual secrecy agreements with the

and staff members will be subject to reminders about security considerations and possible penalties for improper disclosure.¹⁶¹

The Director-General is responsible for establishing the procedures to be followed in the event of a breach or alleged breach of confidentiality.¹⁶² If the Director-General has proper justification to believe that the obligation to protect confidential information has been violated or receives an allegation to this effect, s/he may initiate an investigation.¹⁶³

If staff members breach confidentiality, the Director-General must impose appropriate punitive and disciplinary measures.¹⁶⁴ However, the Organization cannot be held liable for any breach of confidentiality committed by members of the Technical Secretariat.¹⁶⁵ Where the Organization and a State Party divulge confidential information, an *ad hoc* Commission will be convened to settle the dispute.¹⁶⁶

4.2 TAKING OF PROPERTY BY OPERATION OF LAW.

Private property may be taken by the government either by expropriation, confiscation or revocation. "Expropriation" takes place when the government uses its sovereign power to acquire property for a public use. "Confiscation" occurs when property is forfeited to the government because its owner has used it contrary to law. Revocation occurs when a previously-granted government license or benefit is rescinded for breach of a legal obligation.

4.2.1 Expropriation of Property.

Expropriation of property differs from confiscation because the owner of expropriated property is not considered a wrongdoer. Consequently, both international law and the domestic laws of some countries surveyed protect the owner's interest.

Technical Secretariat which cover the period of their employ. *Id.* (9).

¹⁶¹*Id.* (10).

¹⁶²*Id.* D(18).

¹⁶³*Id.* (19).

¹⁶⁴*Id.* (20). State Parties must assist in the investigation of an alleged breach and assist in taking appropriate action if a breach is discovered. *Id.* (21).

¹⁶⁵*Id.* (22).

¹⁶⁶*Id.* (23).

4.2.1.1 **General Principles of International Law.** Traditionally, international law does not protect domestically-held private property of a nation's citizens, but it does protect the property of aliens. To remedy this omission, Article 17 of the Universal Declaration of Human Rights provides that: "1. Everyone has the right to own property alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property." However, the right to hold property is not protected in the International Covenant on Civil and Political Rights; interference with the enjoyment of private property could be remedied under Article 26 which protects equal treatment under the law.

The European Convention on the Protection of Human Rights and Fundamental Freedoms recognizes the right to private property, but it permits interferences with this right if there is a public interest justification *and* the interference is proportional to a legitimate aim. Persons deprived of property are entitled to fair compensation, although the Convention itself is silent as to its amount. The Inter-American Convention has adopted similar provisions. Interestingly, under article XIV of the American Declaration of the Rights and Duties of Man of 1948, the "right to work" provision, compensation may be required if the CWC causes the closure of private production facilities.

4.2.1.2 **National Law.** Nearly every country prohibits governmental takings of property except in the public interest and provided just compensation is paid.

In a few countries, the constitution explicitly so provides. The Mexican Constitution, article 27, provides: "Expropriations shall be carried out only for the cause of public benefit and through compensation. The Nation has at all times the right to impose on private property the modalities dictated by the public interest." The Turkish Constitution, clause 46, permits expropriation of anyone's property in the public interest. Clause 47 specifies that privately owned property may be nationalized if actual value is paid. An owner may apply either to an administrative court to nullify an expropriation decision or to the court of peace if s/he believes that the value of the property has been appraised too low. In France, the Declaration of the Rights of Man and Citizens of 1789, which was incorporated into the Constitution, specifies the inviolability of private property, except for expropriation justified by the general interest and just compensation.

Where the constitution does not prohibit takings, the protection against uncompensated governmental expropriation is less definite. In India, the Constitution prohibited taking private property except for a lawful public purpose and upon payment of compensation, but this right was repealed in 1977. Now, no specific enunciation of public purpose is necessary, nor must compensation be prescribed. As a result, only gross arbitrariness may give rise to a cause of action. In Russia, a state decision to terminate property rights is permissible if the owner receives compensation equivalent to the losses suffered from the termination. If the property owner does not agree with the termination, he may seek judicial review.

German law somewhat uniquely expands the protection against taking property without a public interest and payment of just compensation. The courts have held that an unlawful intrusion into the rights of an individual by the state must be equated to an expropriation under two conditions: (1) when the content and effect are identical to an expropriation, and (2) when the effects amount to a special sacrifice.

4.2.2 Confiscation of Property.

Considerable variation exists among the countries surveyed concerning property confiscation. In Hungary, section 77 of the Criminal Code provides that anything used, or intended to be used, as an instrument to perpetrate a criminal offence, or anything resulting from a criminal offense is subject to confiscation. In the case of an unlawful or unjustified property confiscation, the confiscated objects shall be returned to their owner. If damages result, the responsible party, including legal entities and public organs, shall pay compensation. However, no indemnification would be paid for property confiscated as a result of legitimate CWC enforcement activities since reimbursement is due only if the damage is caused by an action contrary to law. Furthermore, the means and methods applied during the inspection would not infringe an owner's property rights.

In Brazil, goods cannot be confiscated unless they are the instruments of crime, such that their production or use constitutes illegal acts or they are products of a criminal activity. Under article 243 of the Constitution, clods of earth of any region where illegal cultures of psychotropic plants are located may be removed without compensating the owner. Any goods of economic value obtained from illegal narcotics traffic may be confiscated.

In a few countries, confiscation is strictly limited. In Chile, the Constitution forbids the confiscation of property even as a criminal penalty, except that confiscation is permitted with regard to organized crime activities. In Czechoslovakia, the Charter limits confiscation to satisfy the imposition of a fine or a judicial order to forfeit property in a criminal proceeding. Administrative sanctions or forfeiture may also be imposed for petty offenses. In Russia, termination of the right to property, contrary to the property owner's will, is impermissible except in cases of recovery proceedings against the owner's assets.

4.2.3 Revocation of Licenses.

There is nearly unanimous agreement that activities which violate a properly ratified CWC would support revoking a license, especially if that treaty so specified. In Mexico, Italy, Russia, Czechoslovakia, and India, evidence of a CWC violation may be grounds for the suspension or revocation of a commercial facility's permit. In Hungary, a CWC violation can be the basis for revoking a facility's license as well. Revocation is easier to accomplish for a state-owned facility than for a privately-owned company. With a privately-owned facility, the Court of Registration, in cooperation with a prosecutor, is authorized to revoke. In addition, a licensed facility's activities may be limited during a criminal investigation. In

one country, the United Kingdom, whether a facility's permit is subject to revocation or suspension is contingent upon the statute authorizing the inspection.

Two of the reporters suggest that the CWC should include specific provisions calling for the revocation or suspension of a facility's license if a violation is discovered. Iran generally follows the rule that a CWC violation would be grounds for revoking or suspending a commercial entity's license or regulatory permit. The Iranian reporter suggests that this sanction should be clarified by incorporation into the CWC. The Greek reporter posits that the government would adhere to a CWC provision which calls for the revocation or suspension of a permit as a result of a treaty violation.

In a number of countries, a facility's permit may be revoked depending on the nature and scope of the violation. In Egypt, revocation or suspension may result if a major violation of the CWC is discovered, whereas a minor violation may result only in suspension rather than revocation of the permit. Generally, evidence obtained in an illegal CWC inspection cannot be used in a revocation proceeding. If the illegally obtained evidence is contraband, the court must confiscate it and revoke the facility's license. In contrast, if the evidence demonstrates a violation of another law, its use to revoke or suspend a commercial facility's permit depends on the relevant legislation. Similarly in Chile, violation of either the CWC or the domestic law will support a revocation or suspension of a commercial facility's license. Yet, evidence of such a violation is not necessarily sufficient grounds for license revocation which depends on the nature and seriousness of the violation. In France, a license revocation can be a sanction only if the relevant statute precisely so provides.

In many of the countries surveyed, failure to observe CWC inspection procedures may provide a facility with a defense against a revocation. In Turkey, the disclosure of trade secrets or violation of inspection procedures during a CWC inspection may provide a cause of action to challenge a revocation. Similarly in China, if CWC procedures were not observed, a facility's license cannot be revoked as a result of the evidence gained during that inspection. In Mexico and Italy, evidence obtained in violation of CWC procedures would be inadmissible at a suspension or revocation proceeding.

4.3 TRADE SECRET PROTECTION.

Valuable trade secrets could be lost through declarations and reporting requirements and as a result of routine or challenge inspections. Thus, trade secret protection is one of the most important concerns of the industries whose facilities will be inspected under the CWC. The following discussion compares the extent to which the surveyed nations regard trade secrets as property, what duties to protect trade secrets are imposed on private individuals and on governments, and whether courts may prohibit inspections that are likely to reveal protected trade secrets.

4.3.1 Trade Secrets as Property.

A substantial number of countries including the United Kingdom, Japan, Iran, and Egypt endow trade secrets with the status of property. In Czechoslovakia, the Commercial Code now regulates trade secrets. In Morocco, the Decree concerning the Protection of Industrial Property created a Moroccan Office of Industrial Property that extensively regulates patents, trademarks, designs, and commercial secrets, and enumerates penalties against those who violate regulations.

In some countries such as Greece and Israel, trade secrets are not specifically protected as items of property, but there is a legal right to the protection of secrets from undue disclosure. In Russia, the Law "On Enterprise and Enterprising Activity" confers legal protection on commercial secrets; the Law "On The List of Data That May Not Be Ascribed To Commercial Secrets," lists entrepreneurial documents as to which there is no legal right to confidentiality. These statutes are meant to prohibit the invocation of trade secrets as a pretext to conceal something of interest to state inspectors.

France is somewhat unique in that the protection of trade secrets has, in recent years, come into conflict with the need to regulate business which, in turn, requires that administrators have at their disposal sufficient information. A number of recent laws have required firms to declare certain information such that the respect for trade secrets is no longer an absolute principle.

4.3.2 Duty To Protect Trade Secrets.

All countries that recognize the value of trade secrets also impose legal liability for their undue disclosure. In Morocco, article 446 of the Penal Code holds all persons responsible for the secrets entrusted to them, and holds persons who breach this responsibility liable for compensation. In Russia, since trade secrets are not property, the victim of an unauthorized disclosure has the difficult burden of proving that the disclosure directly caused the sustained losses. Some countries, including Egypt, Morocco, Turkey, and Brazil, attach criminal liability for a breach of this duty.

4.3.3 Extension of This Duty to Government Officials.

Most countries extend the duty to protect trade secrets to government officials. However, there is variety in the available remedies when this duty is breached.

In some countries, sanctions focus primarily on the individual inspectors. Under the Turkish Commercial Code, section 229, disclosure of a secret found during the course of an inspection is an offense. Inspectors may be subject to punishment (imprisonment and fine) under Section 198 of the Criminal Code upon the complaint of the enterprise whose secret has been divulged. In Morocco, participants in administrative inspections must maintain

confidentiality, and compensation is available in the event this obligation is breached. In Germany, just compensation is due if trade secrets are expropriated.

In Brazil, the disclosure of trade secrets constitutes the crime of violation of functional secrets which carries a penalty of detention of up to 2 years or fine. In Hungary, unauthorized disclosure of a private secret by an inspector is a crime. In Greece, the disclosure of trade secrets may lead to a victim's claim for damages only under general tort provisions or if a government official has committed an illegal act or omission. Consequently, if the government inspection is legal, an inspector's improper disclosure of trade secrets could lead to claims for indemnity only if express statutory provisions obligate the inspectors to secrecy.

In a few countries, the law affirmatively provides that the state may be liable in the event of trade secret disclosure as a result of regulation. In Iran, state agents are under a duty to respect trade secrets. If a secret is revealed during an official governmental inspection, a suit for damages may be brought against the agent at fault or the State itself if the disclosure is a matter of State fault. Similarly in Egypt, the owner of a disclosed trade secret may sue the government for compensation if: (1) the disclosure of trade secrets is the government's fault; (2) the injured party is harmed; and (3) there is some connection between the governmental agency and the individual official. In France, if an administrative authority illegally discloses a trade secret, the injured party may receive compensation by proving injury, major error, and causation.

4.3.4 Injunctions to Protect Trade Secrets.

Only a few countries would consider enjoining an inspection due to the possibility that it could lead to disclosure of a trade secret. Mexico and Chile are the only nations where an injunction is clearly available, but only when denying the injunction would preclude the complainant from protecting its rights. In the United Kingdom and Greece, an injunction to prevent disclosure is available but only if a statute expressly provides. In Brazil, the possibility that an inspection would disclose trade secrets is not enough to justify an order prohibiting inspections. However, if inspectors would always and necessarily disclose secrets, the constitutionality of the CWC itself would be in question.

In some countries, it is unclear if possible disclosure of a trade secret would lead to a grant of injunctive relief. In Egypt, an injunction may be possible depending on the facts of each case, the type of trade secret, and the kind of enterprises involved. In India, a stay order is issuable against the government if not issuing it would adversely affect individual rights. Stay orders are frequently given. An infringement of a patent (which may include trade secrets) will be subject to stay order jurisdiction. In Japan, the Unfair Competition Prevention Law enables a trade secret owner to claim for discontinuance or prevention when the secret is illegally used or disclosed.

In some countries, a right to injunctive relief is unavailable because an injunction would interfere with the administration's obligations to fulfill treaty requirements. In Russia, an injunction would not be granted lest it restrict the executive's prerogatives to comply with a duly ratified international treaty. The importance of CWC compliance will prevail over the necessity to prevent disclosure of trade secrets during a government inspection. However, a court may order that special measures be taken to minimize the risk of disclosure. In Iran and Morocco, a court cannot forbid an inspection out of fear that trade secrets would be divulged since the search will be a sovereign act of state.

In other countries, injunctive relief is denied because a remedy is available after undue disclosure. In Turkey, Czechoslovakia, and Hungary, a court could not prohibit an inspection performed by an administrative body based on a mere "possibility" or "probability" of disclosure. Punishment of the official after the offense is committed is the only remedy.

4.4 STATE LIABILITY FOR DAMAGES FOR INSPECTIONS THAT WRONGFULLY INTERFERE WITH PROPERTY RIGHTS, INCLUDING TRADE SECRETS.

The right to property generally conveys the right to be compensated if the government takes or destroys that property. In nations that regard trade secrets as property, trade secret owners may be entitled to invoke their general right to monetary damages if their trade secrets are lost in the course of a CWC inspection. In some countries, however, this right may be forfeited if the owner is found to have violated the CWC.

4.4.1 Right To Damages Generally.

In some countries, the state must pay damages if its agents' activities exceed the authorized scope of inspection. For example, in Hungary, no indemnification is due for property confiscated pursuant to the CWC; reimbursement is due only if the damage is caused by inspection methods that contravene Hungarian legal requirements. Similarly in Chile, if the inspectors' activities are illegal, the government is liable for material damages including the value of property lost or damaged and all resulting costs including lost profits. The plaintiff may be awarded damages for pain and suffering if s/he offers factual justification.

In Iran and Greece, state agents can cause two different types of damages. First, the agent may be held personally liable for civil or criminal mistake. In Greece, where a civil servant's act or omission has resulted in injury, s/he can be held jointly liable with the state for damages. Second, if the fault is imputable to the State, the State is liable for damages to compensate the victim, unless the injury is the result of sovereign acts. Thus, in Greece, if the civil servant was not at fault, only the state will be held liable. By contrast in Turkey, the government is obligated to compensate for all damages caused by its officials. A plaintiff is entitled to damages from the state when an inspection infringes a pecuniary, procedural, or administrative right or when private property is unlawfully seized, damaged, or destroyed.

In some countries, damages are available only for the actual harm caused by an inspection. In Egypt, the calculation of damages depends on the actual harm suffered and lost profits. Egyptian law does not recognize punitive damages. In Russia, an injured party may seek judicial relief to compel the government to pay for all incurred expenditures resulting from the damage to property and lost profits. However, damages caused by statutory compliance efforts are reimbursable only when that statute so specifies. In Israel, absent a special provision, the state is liable only for negligent acts.

The French reporter stressed that if an injured party cannot seek redress from either the state agent or international authority for injuries caused by inspections, then the CWC's constitutionality may be threatened. However, courts are not competent to judge the legality of an international inspector's activities nor to hold those inspectors liable for damages to those who suffer injuries if the CWC or domestic law is violated. This problem could be solved if the CWC grants states jurisdiction over problems stemming from the inspection, or if the inspection is imputed to the state agent rather than the international authority.

4.4.2 Forfeiture of Damages Due To CWC Violations.

In some countries, a plaintiff's violation of the CWC will bar him/her from suing the government. For example, in China, any right to damages would be forfeited by discovery of illegal conduct. In Iran, Russia, and Czechoslovakia, violation of a properly ratified and enforced international treaty will bar a claim, but damages may be available for state conduct outside the CWC's authorization regardless of the victim's culpability.

In Chile and Greece, the right to damages is not forfeited or waived by the plaintiff's prior illicit behavior. In the United Kingdom, damages would not be barred simply because a company or individual violated the CWC. In theory, even a breach of implementing legislation would not disentitle an enterprise to damages for a wrongful inspection. However, while it is unlikely in practice that such an action would arise, the quantum of damages would probably be affected by any such illegality. In Egypt, if a government inspection uncovers treaty violations, the right to damages may or may not be forfeited depending on the severity of the violation, the provisions of the final text of the CWC, and the text of the implementing laws.

SECTION 5

PENAL LAW IMPLICATIONS OF CWC INSPECTIONS

The penal law implications of CWC inspections are among the most problematic in the treaty. Because inspections may lead to the discovery of evidence of CWC violations that the treaty itself requires to be punished under domestic law, an accused may invoke rights of due process. This section summarizes the obligation in the CWC to enact domestic penal legislation, compares the extent to which different countries recognize rights of suspects under investigation, and contrasts how evidence of illegal activity discovered during searches may be used.

In the United States, evidence obtained by searches and seizures in violation of the Constitution is inadmissible in a legal proceeding. Constitutional rights may be implicated by the possibility that evidence obtained during an administrative inspection could be used in prosecutions under laws not specifically related to that regulatory scheme.¹⁶⁷ In addition, the Fifth Amendment's protection against self-incrimination is intended to prevent a witness from being forced to give testimony that can be used in a criminal prosecution against him or her.¹⁶⁸ The only way to compel answers is to grant that person legal immunity from the use of the divulged information. As a result, the witness cannot remain silent without risking being held in contempt.¹⁶⁹

5.1 RELEVANT CWC PROVISIONS: PENAL MATTERS.

Each State Party must adopt, in accordance with its constitutional processes, the measures necessary to implement its CWC obligations.¹⁷⁰ Each State Party must prohibit natural and legal persons in its territory or under its jurisdiction from undertaking any activity prohibited by the Convention.¹⁷¹ Included in this obligation is a duty to enact penal legislation.¹⁷² State

¹⁶⁷United States v. Nechy, 827 F.2d 1161 (7th Cir. 1987); United States v. Jamieson-McKames Pharm., 651 F.2d 532 (8th Cir. 1981),

¹⁶⁸L. TRIBE, AMERICAN CONSTITUTIONAL LAW § 12-26, at 1021 (2d ed. 1988) (footnotes omitted).

¹⁶⁹Y. KAMISAR, W. LAFAVE & J. ISRAEL, MODERN CRIMINAL PROCEDURE 684 (7th ed. 1990).

¹⁷⁰Draft Convention, *supra* note 1, art. VII, § 1.

¹⁷¹*Id.* (a).

¹⁷²*Id.* § 1(a) and (c).

Parties must also cooperate with other State Parties and provide the appropriate form of legal assistance necessary to implement its CWC obligations.¹⁷³

5.2 RIGHTS OF SUSPECTS UNDER INVESTIGATION.

Many nations recognize that a person under investigation for violations of law is in a particularly vulnerable position. In most countries, protection is provided against self-incrimination. In some countries, a grant of immunity from prosecution may be used to compel suspects to reveal evidence without penal consequences for the witness.

5.2.1 Right Against Self-Incrimination.

Most countries surveyed recognize a constitutional or statutory right against self-incrimination. The Turkish Constitution confers a right to remain silent: "Nobody may be forced to make a statement incriminating himself or a close relative." In Chile, the Constitution provides that, subject to a number of exemptions, no accused person can be compelled to testify as to his own acts and deeds. Evidence obtained from such questioning is inadmissible. Article 38, Paragraph 1 of the Japanese Constitution provides that no person shall be compelled to testify against himself. The Supreme Court has decided that this guarantee applies not only to criminal proceedings but also to proceedings directly related to the collection of evidence necessary to a criminal charge. In Germany, the protection against self-incrimination applies in the context of a criminal prosecution or enforcement of administrative regulations.

A few countries provide constitutional protection against self-incrimination in more limited circumstances. In India, the right against self-incrimination is constitutionally protected, but this right extends only to an "accused" and does not apply in fact-finding investigations. The right also encompasses documentary evidence. Similarly in Czechoslovakia, the Charter includes the right against self-incrimination but only if the testimony would implicate a crime. Brazil's Constitution does not proclaim a rule prohibiting self-incrimination, but Brazilian courts draw that right from the constitutional provisions that prohibit illicit evidence.

In most of the countries surveyed, the right against self-incrimination is a statutory rather than a constitutional guarantee. In Greece, the right not to answer is derived from the Code of Penal Procedure. Hungarian statutes present notable variations on this right. A person may not be pressured or coerced into self-incrimination. This right does not, however, guarantee a right to silence. Rather, it releases the person from the obligation to tell the truth if, by testifying, he would implicate himself or his family in the commission of a crime. In Morocco, the fact that criminal/penal law forbids the use of force during an interrogation to obtain admissions from the suspect implicitly gives the suspect the right to remain silent.

¹⁷³*Id.* § 2.

Statutes in two of the countries surveyed confine the right against self-incrimination to the criminally accused. An Israeli criminal statute grants this right which is lost if the accused elects to testify at his own trial. In the United Kingdom, the right against compulsory self-incrimination is statutorily protected in criminal matters. In administrative matters, however, the right to silence is unavailable; individuals must produce documents and offer explanations even though their answers may incriminate them.

Those countries which have no specific right against self-incrimination prohibit coercion by investigative officials. The proposed draft of the Russian Criminal Procedure Code nullifies the legal significance of improperly obtained testimony. In China, the law encourages an accused to confess, as "confession leads to lenient treatment." Confession is said to be different from compelled self-incrimination.

5.2.2 Grants of Immunity.

The nations surveyed are divided as to whether immunity may be granted. Some nations freely grant immunity in exchange for testimony. In the United Kingdom, witnesses may testify under a grant of immunity. This arises generally in cases of accomplice evidence.

Other countries grant immunity only in limited circumstances. In Greece, the authority to grant immunity from prosecution applies only during a preliminary investigation. If a suspect is compelled to testify, his testimony is not included in the dossier of the case.

Finally, some countries will not grant immunity under any circumstances. In Chile, the concept of immunity is unknown. In Italy, the rule of "compulsory prosecution" prevents a prosecutor from granting immunity. Grants of immunity are generally alien to German law, but were temporarily introduced with regard to certain crimes such as terrorism.

5.3 USE OF EVIDENCE.

While the primary purpose of CWC inspections is to verify compliance with the treaty, the discovery of activity in violation of the treaty is also likely to have consequences for penal law enforcement. That evidence so discovered may be used in a penal proceeding raises difficult issues as to whether such use is restricted by law and how such evidence may be communicated to law enforcement officials both domestically and internationally.

5.3.1 Limits on Using Evidence from Inspections in Penal Proceedings.

In most countries surveyed, evidence of illegal activity discovered during a properly authorized CWC inspection may be used in subsequent legal proceedings or investigations. There are, however, notable exceptions. In Japan, administrative inspections conducted by the administrative agencies for the purpose of criminal investigation are impermissible. In France, strict limits attend such use of evidence. Judicial police officers do not have the right to seize evidence relating to another infraction except in the case of a crime in progress

or a misdemeanor punishable by imprisonment. But the police have the power to search any room relating to the crime in progress.

Some countries have procedures which inspectors must observe when they discover evidence of illegal activity. In Iran, an administrative or judicial agent who discovers a violation while conducting an authorized search must immediately notify his superior or the official that authorized the search. Evidence of an infraction that could lead to arrest will be brought to the attention of a prosecutor. Thus, one search can lead to the need for another. In Brazil, evidence of illegality obtained during a CWC inspection must be reported, even if the illegality is unrelated to the CWC.

In Morocco, administrative investigators may perform the same functions as judicial police agents. Administrative inspections often lead to the reporting of criminal activity. Thus, while administrative agents may investigate only compliance with administrative regulations, a detected violation may provide the basis for a more extensive investigation that can lead to the discovery and seizure of other evidence and eventual criminal prosecution. Finally in India, the inspecting agency may only seek evidence relevant to the objectives of the law that authorizes the inspection. If prima facie evidence of other conduct emerges during on-site inspections, such evidence could be reported to law enforcement authorities for a separate inspection and prosecution.

In some countries, the failure of inspectors to observe CWC provisions or domestic law may taint evidence obtained during an inspection and render it inadmissible. In Egypt, contravention of search procedures nullifies the value of the evidence procured, but a second search conducted in a legal manner will not be nullified. In Greece, evidence obtained in violation of CWC procedures may not be used in criminal proceedings, but may be used in administrative proceedings. In Germany, indirectly obtained evidence discovered during an illegal search is not necessarily inadmissible, but the right to a fair trial may render it inadmissible or taint its probative value.

In the United Kingdom, evidence discovered during an inspection may be used in criminal proceedings and, as already mentioned, persons providing such evidence are not protected by the rule against self-incrimination. Evidence obtained by an inspection purportedly for one purpose but conducted for another is unfairly obtained and thus inadmissible; but evidence of an entirely unrelated crime discovered in the course of such an investigation would be admissible. English law protects against the abuse of power, but not against the risk of discovering incriminating material.

A few countries even allow the use of evidence illegally obtained during an inspection, i.e. where the inspectors contravene laws governing a valid inspection, including those of the CWC. In Israel, unlawfully obtained evidence may be used, subject to stipulated exceptions. In China, it is a fundamental principle of criminal justice that all facts which can demonstrate guilt must be used in criminal proceedings. Therefore, evidence garnered during a CWC inspection will be used in any subsequent, unrelated proceedings. In Chile, the use of

evidence gained from a CWC inspection is more limited in scope. It cannot be used to arrest persons associated with a facility unless the evidence discovered proves a flagrant offense committed by those physically present during the inspection, in which case it may be used to secure a conviction.

5.3.2 Communication of Evidence.

Because discovery of illegal chemical weapons production will likely be by officials who are not authorized to prosecute crimes, the evidence must be transferred to other law enforcement officials. Furthermore, since illegal production activity may involve more than one country, CWC inspections in one nation may discover domestic law violations in another. Therefore, it is important to assess how different states regard the communication of such evidence.

5.3.2.1 Communication of Evidence to Other Domestic Authorities. The countries surveyed unanimously agree that evidence can be communicated to another domestic authority. The decision to transmit evidence to other governmental entities is discretionary in most of the countries surveyed. In Greece, unless otherwise provided, evidence obtained pursuant to a CWC inspection may be communicated to other law enforcement authorities. In Mexico, the United Kingdom, and Russia, there is no prohibition against law enforcement authorities communicating information to other law enforcement authorities. In Czechoslovakia, officials may pass evidence obtained during an administrative or CWC inspection to any national law enforcement authority. A person in possession of economic or state secrets may transmit that information only if s/he is relieved of the duty of non-disclosure.

In Brazil, Turkey, Hungary, and Italy, public authorities must transmit evidence to each other. In Chile, the transmission of evidence among officials may be mandatory depending on the nature of the violation. If the investigating judge has evidence of a criminal offense, but does not have jurisdiction over the case to which it relates, s/he must send the evidence to the proper judge. The law is silent regarding administrative offenses. Thus, judges have discretion as to whether to inform the relevant government agency. In Germany, the right to communicate evidence internally is provided by statute. Indeed, it is mandatory for a governmental agency to transmit evidence to another governmental agency that requires such information.

5.3.2.2 Communication of Evidence to Foreign States. In some countries there are few restrictions on the transmission of evidence to foreign authorities. One common restriction, however, requires that evidence can only be transmitted under the provisions of a bilateral or multilateral mutual legal assistance treaty (MLAT) – where states obligate themselves to provide judicial and administrative assistance in securing admissible evidence. In Israel and the United Kingdom, communication of evidence to a foreign state is permissible unless there is a contrary provision of law. In Chile, the decision to send evidence to a foreign state is within the judge's discretion. Iran circumscribes the ability to

transmit evidence even if an international instrument requires it. In the criminal law context, evidence can only be transmitted to states which are party to an MLAT. However, like most countries, evidence cannot be transmitted if it contains national secrets. Information regarding international cooperation may be exchanged except for state secrets. In Hungary, transmission of data to a foreign state cannot contravene public order.

In most of the countries surveyed, communication of evidence to foreign states requires some express authorization by a specific provision of the CWC or other international instrument such as an MLAT. In Germany, Italy, and Mexico, communication of information to foreign officials depends on whether an international treaty or MLAT so requires. In Greece and Turkey, officials may communicate evidence to foreign states within the framework of multilateral MLAT, international conventions, and bilateral treaties.

Some countries require specific authorization for evidence to be transmitted to a foreign state. In India, communication of evidence to a foreign state is not allowed in the absence of a statutorily authorized procedure. Similarly in China, communication with foreign law enforcement agencies must be specifically approved by designated government officials.

So long as the CWC contains an obligation to provide judicial assistance, nearly all states would allow such communications. In general, Moroccan law does not allow the transmission of evidence to a foreign authority, but if the CWC expressly provides for sharing evidence among State Parties, Morocco would conform due to the supremacy of treaties over domestic law. In Russia, while evidence may be exchanged pursuant to an MLAT, the CWC must provide that evidence may be exchanged pursuant to such an MLAT. While Brazil does not recognize a duty to communicate evidence to foreign states, no legislation exists that would interfere with a specific requirement in the CWC.

Similarly in Czechoslovakia, nothing prevents passing evidence obtained during a CWC inspection to another state if the CWC so stipulates. However, according to the Turkish report, the CWC does not sufficiently create a duty to supply information to a foreign state. The reporter believes that this section does not create a mechanism for the exchange of evidence: a contracting party must answer questions asked, but there is no mechanism for the mandatory disclosure of information.

SECTION 6

CONCLUSIONS

The Chemical Weapons Convention will create unprecedented law enforcement obligations for each State Party. The provisions for routine and challenge inspections will require extensive searches beyond established domestic administrative procedures. Therefore, the CWC poses novel implementation problems throughout the world.

This study has identified numerous issues which, although significant, will not hinder the implementation of the CWC anywhere. However, several other conclusions identify areas where enforcement of the CWC's verification measures could lead to domestic constitutional challenges.

The process of ratifying and implementing the CWC will be similar in most countries. Nearly every country will require legislative ratification before the CWC can come into effect. Many reporters identified the need for expansive and carefully drafted implementing legislation as crucial to effective implementation. While the CWC will be subject to some form of judicial review in most states, few reporters anticipated that the courts would actually interfere with the ratification process. Nearly every reporter agreed that domestic implementation of the CWC will be state action with the consequence that such efforts will be subject to the legal limitations imposed on traditional law enforcement activities. These considerations notwithstanding, no country identified any impediment to CWC ratification and implementation.

Perhaps the most significant conclusion drawn from this study is the realization that the United States is not alone in its stolid concern for protecting privacy and property rights. Every country surveyed recognizes the right to privacy and the right of an individual not to have his/her property taken by the government without regard to due process or the payment of just compensation. The right to privacy in one's home is inviolable and accorded special protection in every country surveyed and most countries require law enforcement officials to secure a warrant before a home can be searched.

Numerous conclusions relate directly to inspections of commercial establishments and the regulation of industry. The same types of industries are subject to administrative inspections in most countries. Significantly, industries related to chemicals, pharmaceuticals, nuclear power and waste, and arms production are subject to inspection in many countries. Administrative inspectors responsible for such inspections are granted broad powers and subject to few restrictions in nearly every country. Yet, many countries require officials to secure some sort of warrant in order to conduct an administrative inspection -- making the CWC's lack of a warrant requirement problematic in light of the fact that most countries provide for the granting of an injunction to prevent an illegal inspection. Citizens who are

subject to administrative inspection must cooperate or face criminal or civil penalties in most countries.

In relation to the right to hold property, every country recognizes that trade secrets are protected. Moreover, individuals in every country surveyed are entitled to damages from the government in the event that an inspection injures their property or violates their right to privacy. While loss of property rights, including trade secret disclosure, may give rise to a right to compensation, CWC inspections probably cannot be stopped for this reason.

Most states recognize a right against self-incrimination, but few reporters indicated that this right poses serious problems for CWC implementation. The possibility that a citizen could face penal consequences unrelated to the CWC due to the discovery of evidence during a CWC inspection is more troubling. Finally, since enforcement problems will arise in conjunction with matters arising in other countries calling for inter-state cooperation, many reporters urged development of methods whereby State Parties will lend to each other the maximum judicial assistance permissible under their national laws.

The CWC will be an international undertaking in its truest sense. Mutual understanding of the national values and norms embodied in different legal systems can help make this treaty succeed in an atmosphere which affords due respect to human rights and the rule of law. Better integration of CWC inspection requirements and existing intergovernmental administrative procedures will also speed and smooth cooperative international enforcement. Careful planning and recognition of potential problem areas are the most effective means of achieving this goal.

APPENDIX A

**RECOMMENDATIONS FOR EFFECTIVE INTERNATIONAL LAW
ENFORCEMENT**

The comparative study of CWC implementation inspired discussions among the distinguished experts who contributed to it concerning topics that may be critical to the CWC's success. Those discussions identified certain problems and recommendations.

The task of ensuring that the CWC is effectively implemented will initially fall on the Preparatory Commission, an interim transitional body to be convened by the United Nations Secretary General within 30 days after the CWC is signed by 50 nations.¹⁷⁴ The Preparatory Commission will be responsible for developing essential draft models and agreements related to implementation and verification.¹⁷⁵ In addition, the Preparatory Commission will be required to facilitate the effective exchange of information between State Parties.¹⁷⁶ The following recommendations are directed to these efforts.

**A.1 DEVELOPMENT AND DEPOSITION OF MODEL IMPLEMENTING
LEGISLATION.**

This Report indicates that while State Parties may have the same goals and desire to enforce the CWC, there are significant differences in the administrative capabilities and tendencies of the State Parties. Not every state will be able to carry out its CWC obligations with the same degree of effectiveness. Thus, it will be important to assess methods for assuring consistent enforcement among all State Parties.¹⁷⁷ A series of provisions are recommended to make the requirement for national implementing legislation more specific.

¹⁷⁴*Draft Convention, supra* note 1, Text on the Establishment of a Preparatory Commission [hereinafter Commission Text], § 1. The Commission will sit at the Hague, will be composed of one representative from each State that signs the CWC, and the costs of the Preparatory Commission will be borne by the signatory States. *Id.* §§ 3-5.

¹⁷⁵*Id.* § 12(a)-(w).

¹⁷⁶*Id.* § 14(a)-(b).

¹⁷⁷A method of determining the different capabilities of various states would be to study the actual implementation of the Council of Europe: European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, 1988, 27 I.L.M. 1152, which is the only multilateral instrument providing for mandatory on-site inspection conducted by an international organization.

A.1.1 Recommendation for Model National Legislation.

The CWC should include a model national law or set of principles and guidelines for national implementation. Many national reporters expressed concern at the prospect of implementing legislation that produces either a lower threshold of enforcement than CWC drafters anticipate, or a level of enforcement that is constitutionally unacceptable in a given state.¹⁷⁸ Uniform model legislation would assist State Parties in formulating and enacting their own domestic implementing legislation and enhance consistency among various State Parties.

A.1.2 Recommendation for Time Limit to Enact Enabling Legislation.

Each State Party should be obligated to enact legislation within a specified period of time, e.g. two years.¹⁷⁹ Failing enactment of national legislation, the State Party should be required to file an explanatory report.¹⁸⁰

A.1.3 Recommendation for Model National Authority.

Each State Party must establish a special enforcement section to aid CWC implementation. In order to avoid competition among internal bureaucratic divisions inherent in most countries' administrative and law enforcement regimes,¹⁸¹ the CWC Preparatory Commission should establish principles and guidelines for the National Authority in each nation to

¹⁷⁸For a discussion of the recommendations of some of the national reporters as to the need for extensive CWC implementing legislation, *see supra*, § 3.6.

¹⁷⁹This deadline could be imposed by the Preparatory Commission which is already empowered to create deadlines for other implementation-related information. Commission Text, *supra*, note 174, § 12(k).

¹⁸⁰It may also be useful to require each State Party to submit draft legislation prior to its final enactment so that any potential conflicts concerning implementation can be identified.

¹⁸¹National criminal justice systems consist of different sub-systems. The most common divisions are among law enforcement, prosecution, judiciary, and corrections. Also, each sub-system may have its own separate bureaucratic and administrative units. Often, these sub-systems are self-contained entities with their own peculiar bureaucratic and administrative exigencies and their own life. This fragmentation leads to each sub-system protecting its own interests, methods, goals, and purpose. This confrontation makes integration difficult, and, ultimately, leads to the whole criminal justice system's fragmentation. Conversely, the inefficiencies of bureaucratic and administrative divisions would not hinder potential CWC violators. *See* M.C. Bassiouni, Report Presented to the Seventh United Nations Congress on Crime Prevention and the Treatment of Offenders (Milan, Italy Aug. 26 - Sept. 6 1985) at 40-43, A/Conf.121/NGO 1 (1986) (thorough discussion of the effects of bureaucratic sub-systems on the administration of criminal justice).

administer the treaty's operations. Furthermore, provisions should be considered to require that the administrator of such National Authority would be authorized to communicate with counterparts in other State Parties. Finally, while conflicts among different administrative organs claiming jurisdiction over a particular matter may be unavoidable, the Preparatory Commission should identify its method for allocating tasks of domestic implementation, communication, and enforcement.

A.1.4 Recommendation to Limit Penal Implications of the CWC.

A significant number of the national reporters warn of the possible complications that would attend the CWC if verification inspections could lead to penal consequences for violations of laws unrelated to the CWC.¹⁸² Accordingly, the transfer of information from CWC inspectors to agents of the National Authority or other domestic law enforcement officials should be strictly regulated so that CWC inspections never become penal searches in the guise of administrative regulation.

A.1.5 Recommendation to Create a Depository of National Legislation.

An important element of effective interstate cooperation and overall enforcement will be a requirement that State Parties deposit a copy of all relevant laws and regulations implemented by that State Party into a CWC database or file.¹⁸³ This requirement, like that contained in the 1961 Single Convention on Narcotic Drugs¹⁸⁴ and the 1971 Convention on Psychotropic Substances,¹⁸⁵ would facilitate the exchange of information,¹⁸⁶ as well as facilitate the tracking of national legal developments. The Preparatory Commission should specify: (1) the period of time, after enactment, within which legislation must be deposited; (2) where and to whom deposits should be made; and (3) the material required to be deposited, including relevant court decisions and new legislation to maintain the currency of the database.

One potentially problematic detail that is often overlooked in this area is a failure to require that copies of domestic laws and regulations be submitted in an official language. Otherwise,

¹⁸²See *supra*, § 5.3.1.

¹⁸³The Preparatory Commission may have the power to develop regulations related to a legislation depository under its authorization to conduct studies and prepare reports that it deems necessary. See Commission Text, *supra* note 174, § 14(b). There should be a mechanism for the CWC Organization to update its database of domestic laws automatically to ensure accuracy.

¹⁸⁴Single Convention on Narcotic Drugs, 1961, 18 U.S.T. 1407.

¹⁸⁵Protocol Amending the Single Convention on Narcotic Drugs, 1961, 1972, 11 I.L.M. 804.

¹⁸⁶Commission Text, *supra* note 174, § 14(a).

reports and copies of laws will be submitted in various languages, creating expense and difficulties in communicating information effectively.

A.2 FACILITATION OF INTERNATIONAL ENFORCEMENT.

The massive international trade in chemicals could profoundly hamper efforts to bring them under control. Many participants in the chemical industry engage in transnational activities either by operating affiliates in foreign jurisdictions or by extensive contractual arrangements with independent firms in other countries.¹⁸⁷ The CWC must, therefore, develop a system for the international regulation of the industry in a manner that does not unduly interfere with international trade.

Two problems deserve serious attention. First, a chemical firm within member State Parties may establish operations in a state that is not a party to the CWC in a deliberate attempt to avoid the treaty's prohibitions, either with or without the tacit consent of its own government. This possibility raises the issue of the CWC's extraterritorial jurisdiction. Would such a facility be subject to CWC enforcement by virtue of its corporate parent that is headquartered in a member State Party? Would the member State Party in whose territory the parent operates be obligated to verify that the foreign subsidiary is not engaging in conduct prohibited by the CWC?

The second problem concerns the possibility of chemical weapons segmentation or parcelization. Instead of producing lethal agents at one facility where inspections could reveal them, operations may be split among numerous facilities in various countries making detection more complicated. This problem is worsened by the possibility that the last, critical phase which would necessarily be discovered by a CWC inspection may take place in a state that is not a party to the CWC. Thus, CWC inspectors would only detect discrete, seemingly innocuous operations in various countries, none of which constitutes a violation of the CWC, but would not detect the overall scheme that subverts the CWC's lofty goals.

The following recommendations are intended to address either or both of these potential problems.

A.2.1 Recommendation to Extend Reach of Extraterritorial Jurisdiction.

The Preparatory Commission should consider to what extent and upon what theoretical basis extraterritorial jurisdiction should be expanded so as to reach as many chemical weapons

¹⁸⁷The recent controversy concerning the Indian shipment of T-P to Syria is a striking example of this concern. See Michael R. Gordon, *U.S. Accuses India on Chemical Arms*, N.Y. TIMES, Sept. 21, 1992, at 2.

activities as possible.¹⁸⁸ Accordingly, guidelines should be established concerning what percentage of a foreign chemical weapons firm owned by a company headquartered within a State Party should constitute "control-in-fact" for jurisdictional purposes. Furthermore, guidelines should specify that transfer of trade secrets or other proprietary information pertaining to chemical production will support the application of the major theories of jurisdiction to CWC violations.

A.2.2 Recommendation to Encourage Inter-State Legal Assistance.

Particular attention should be paid to encouraging effective interstate cooperation. Various modalities should be addressed, particularly mutual legal assistance and the recognition, transfer and enforcement of foreign judgements and orders.

Provision must also be made whereby a State Party can secure information relating to facially non-criminal but suspect activities even though that information may not amount to what would ordinarily be secured via a Mutual Legal Assistance Treaty (MLAT).¹⁸⁹ In addition, procedures which allow the CWC Organization to communicate information which falls short of MLAT criteria could be outlined in an inspection/verification manual. Ideally, these procedures will allow inquiries to be processed without the use of the usual mutual legal assistance provisions.¹⁹⁰

Many national reporters suggested that the CWC should contain a specific provision on the duty of State Parties to lend to each other the maximum judicial assistance permissible under their national laws.¹⁹¹ States should also be obligated to enact appropriate legislation where necessary and to rely on the provisions of the CWC if national law requires that judicial assistance be premised on a treaty. Such a provision would, in effect, make the CWC a multilateral MLAT. Otherwise, cooperation between State Parties will be unnecessarily risky.

A.3 HARMONIZE THE CWC WITH NORMS OF INTERNATIONAL TRADE REGULATION.

¹⁸⁸See Koplou, *Long Arms and Chemical Arms: Extraterritoriality and the Draft Chemical Weapons Convention*, 15 YALE J. INT'L L. 1 (1990).

¹⁸⁹See *supra*, §5.3.2.2.

¹⁹⁰The Preparatory Commission would be effective in this regard, given its authority to facilitate the exchange of information related to implementation. Commission Text, *supra* note 174, § 14(a). The task of preparing any such regulations would logically fall on the Commission and would, subsequently, be a matter for the Technical Secretariat.

¹⁹¹See *supra*, § 5.3.2.2.

The August 10, *Chairman's Text* details the prohibitions and procedures that States Parties must follow when transferring Schedule 1, 2 and 3 chemicals to Nonstate Parties. The strongest restrictions are on Schedule 1 and 2 chemicals. 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.¹⁹² Also, transferred chemicals may not be retransferred to a third state.¹⁹³ Schedule 2 chemicals, three years after the CWC enters into force, may only be transferred to or received from States Parties.¹⁹⁴ Transfers of Schedule 3 chemicals are regulated but not banned.¹⁹⁵ Five years after the CWC enters into force, the Conference will consider further regulations on transferring Schedule 3 chemicals to Nonstate Parties.¹⁹⁶

This regulation of inter-state transfer of chemicals is supplemented by Article XI which obligates State Parties to facilitate economic or technological development and exchange scientific and technical information and chemicals and equipment for purposes consistent with the CWC.¹⁹⁷ Furthermore, State Parties may not restrict or impede trade and the development and promotion of scientific and technological knowledge in the field of chemistry for industrial, agricultural, research, medical, pharmaceutical, or other peaceful

¹⁹²Verification Annex, *supra* note 1, pt. VI, (B)(3).

¹⁹³*Id.* (4).

¹⁹⁴*Id.*, pt. VII, C(31). However, during this three year period, a State Party may transfer Schedule 2 chemicals to a Nonstate Party provided they require an "end-use certificate" from the Nonstate Party. *Id.* (32). Also, the State Party must adopt necessary measures to ensure that transferred chemicals are used only for purposes not prohibited by the CWC. *Id.* The "end-use certificate" must state, in relation to the transferred chemicals: (a) their use will be for a purposes not prohibited by the CWC; (b) they will not be re-transferred; (c) their types and quantities; (d) their end-use(s); and (e) the name(s) and address(es) of the end-user(s). *Id.* (a)-(e).

¹⁹⁵*Id.* pt. VIII, C. As with Schedule 2 chemicals, State Parties that transfer Schedule 3 chemicals to Nonstate Parties must adopt necessary measures to ensure that the transferred chemicals are used only for legal purposes. *Id.* (26). Also, the State Party must require an "end-use certificate" from the Nonstate Party. *Id.* (a)-(e).

¹⁹⁶*Id.* (27).

¹⁹⁷*Id.* Art. XI (2)(b). States Parties must promote the exchange of chemicals, equipment, and scientific and technical information relating to the development and application of chemistry for purposes consistent with the CWC; State Parties are entitled to participate in such exchanges.

purpose.¹⁹⁸ This obligation relates not only to unilateral restrictions but also international agreements incompatible with the obligations under the CWC and this article.¹⁹⁹

A.3.1 Recommendation to Evaluate Legality of Trade Restrictions and Sanctions.

By its terms, the CWC restricts the freedom to trade chemicals. It is likely that these restrictions will prove to be controversial CWC obligations. The Preparatory Commission should consider how such restrictions will likely be enforced and address the nature and extent of monitoring transfers including perhaps inspections of international carriers.

Article XI is unclear as to how CWC violations would be punishable or lead to penal consequences by operation of the law of each State Party. This matter should be resolved, and the modalities of that scheme should be specified. If each State Party is to assume the obligation of punishing illegal chemical transferrers, then the Preparatory Commission should develop models on which such efforts may be based. Indeed, the Preparatory Commission should consider whether State Parties should be permitted/obligated to impose trade sanctions on a state or private firm found to have violated Article XI.

Restrictions on transfers of chemicals potentially contravene the General Agreement on Tariff and Trade (GATT) which establishes the guidelines for regulating international trade. As part of a broader evaluation, the Preparatory Commission should consider how increasing the restrictions on the trade of chemicals can be harmonized with concurrent efforts to liberalize trade of commercial products generally under the GATT.

A.3.2 Recommendation to Assess Affected International Agreements.

The requirements that State Parties facilitate the exchange of technical information and refrain from impeding trade in technological knowledge raise concerns as to the ability to protect intellectual property. The potential loss of trade secrets resulting from CWC operations is a central concern of State Parties and the international chemical industry. Virtually every national reporter indicated that developing means of protecting trade secrets and compensating owners for any losses that might result from compliance with the CWC will be critical to the treaty's success.²⁰⁰ However, the reporters were instructed to focus on potential constitutional conflicts in regard to domestic implementation; little attention was paid to the implications of the CWC on existing international regulations concerning intellectual property. Yet, these implications are significant, even if constitutional rights are not necessarily contravened.

¹⁹⁸*Id.* (2)(c).

¹⁹⁹*Id.*

²⁰⁰*See supra*, § 4.3.

The Preparatory Commission should, therefore, undertake an evaluation of the international legal arrangements for protecting technical information and trade property. This evaluation should focus on the effectiveness of the current system, the likely impact of the CWC, and methods for strengthening protections in accord with the CWC.

A.3.3 Recommendation for Coordination with other Arms Control Regimes.

The CWC should be regarded as but one part of an important, substantive approach to nonproliferation that demands a comprehensive institutional approach. The IAEA, the Nuclear Suppliers Group, the Missile Technology Control Regime (MTCR), the Sanctions Committee (of the Security Council), regional control regimes, confidence-building measures, the UN arms register, and various transnational arrangements could be connected through agreements for mutual support and systems for exchange of information and data.²⁰¹ Various modalities should be studied to carry out such coordinating efforts.

²⁰¹R. Ekeus, *The Iraqi Experience and the Future of Nuclear Nonproliferation*, THE WASHINGTON QUARTERLY, Autumn 1992, at 67.

Appendix B. MATRIX OF RESPONSES OF LEGAL SYSTEMS SURVEYED

	US	BRA	CHL	CHN	CZH	EGY	FRA	GER	GRC	HUN	IND	ISR	ITA	JAP	MEX	MOR	RUS	TUR	UK	UN	YUG
TREATY RATIFICATION AND IMPLEMENTATION																					
Legislative ratification is required for a treaty to be binding domestically.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	Y		
A treaty is subordinate to the Constitution.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		N		Y			Y	Y			
The reporter recommends expansive CWC implementing legislation.	Y	Y	Y	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y
Treaties may be judicially reviewed: (A) pre-ratification; (B) post-ratification; or (N) no review is permitted.	B	B	A	B	N	B	A	B	B	A	B	N	B	B	B	N	A	B	N		
CWC inspections will be "state action."	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		
INSPECTIONS AND THE RIGHT TO PRIVACY																					
The right to privacy is protected by (A) the constitution, (B) statute or custom.	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	A	Y	Y
Biomedical testing is allowed: (A) generally, (B) only in unusual cases, (N) almost never.	B	N	B	N	B	B	B	B	N	B	A	B	B	B	B	B	N	N	A	B	N
Home privacy is uniquely protected.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
Warrant or order must authorize home searches, and law enforcement officials must comply with strict procedures.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y
During the search of a home, the owner or his representative must be present.		Y			Y		Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		
Timing/scope of home searches is regulated.	N	Y			N	Y	Y	Y	Y	Y		Y		Y	Y	Y	Y	Y			
Forced entry to a home is permissible.	Y	Y			Y	Y	Y	Y	Y	Y	Y	Y		Y	Y	Y	Y	Y			
Most rights can be waived.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y

	US	BRA	CHL	CHN	CZH	EGY	ERA	GER	GRC	HUN	IND	IRA	ISR	ITA	JAP	MEX	MOR	RUS	TUR	UK	UN	Other	
ADMINISTRATIVE INSPECTIONS OF FACILITIES																							
Commercial entities enjoy many of the same rights as individuals.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y	N	Y	Y	Y	Y	Y	Y		Y	
Government facilities are entitled to protections under the law.	N	Y	Y	N			Y	N	N	N	N	Y	N	N		Y	Y			Y		N	
Administrative inspections are less restricted and must satisfy fewer prerequisites than more intrusive judicial or criminal searches.	Y	Y	Y	Y	Y	Y	N	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	Y	Y			
Administrative inspections are justified by the public's interest in: (A) public health; (B) environmental protection; (C) nuclear or hazardous substances; (D) arms (chemical weapons) production.	A B C	A C D	A B C D	A B C D	A B C D	A B C D	A B C D	A B C D	A	A B D	A B	A B C	A C	A B C D	A B	A B	A	B	A B C D	Y			
A warrant or order, but not necessarily judicial, is required for an administrative inspection under certain circumstances.	Y		N	N	N	Y	Y	Y	Y	N	Y	Y	Y	N	Y	Y	Y	Y	Y	Y			
Administrative authorities determine the timing and frequency of inspections.	Y	Y		Y		Y	Y	Y	Y	Y	Y	Y	Y	Y			Y	Y					
Even if a warrant is not required, notice is required under certain circumstances.	Y		Y		N	N		N	Y	Y	Y		N	Y	Y	Y	N						
Inspections must be supervised by public officials or judicial personnel.	Y	Y	Y		N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y			
Inspectors may: (A) question personnel; (B) inspect documents, books, and records; (C) take samples.	A B C	A B C		A B C	A B C	A	A B C	A B C	A B C	A B C	A B C	A B	B C	A B C	A B	A B	A	B	B	B	B		B
Certain areas of a facility are considered "private" and not subject to inspection.	Y	Y			N	Y	N	N	N	Y	Y	Y	Y				Y						
The items that may legitimately be seized must be related to the search.	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y			

	US	BRA	CHL	CHN	CZH	EGY	FRA	GER	GRC	HUN	IND	IRA	ISR	ITA	JAP	MEX	MOR	RUS	TUR	UK	UN	USSR
Non-cooperation with an inspection can carry civil/criminal penalties.	Y	Y			Y	Y	Y	Y	Y	Y	Y		Y		Y	Y	Y		Y	Y		
An individual may challenge the constitutionality of an inspection.	Y	Y	Y		Y	Y	Y	Y	Y	N	Y	Y	Y		Y	Y	Y	Y	Y	N		
An injunction or order may be secured to prevent an administrative inspection.	Y	Y	Y	N	Y	Y	Y	Y	N	N	Y	Y	Y	Y	Y	Y	N	N	Y	N		Y
A victim of an improper inspection may obtain damages from: (A) the inspector individually; (B) the government.	B	B	A	B	B	B	B	A	B	B	B	A	A	B	B	B	A	A	A	B	B	B
Legislation or CWC amendments may be necessary to compel individuals/facilities to consent to inspections.	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y	Y		Y				Y	Y			
Legislation or CWC amendments should reconcile constitutional conflicts with the CWC's warrantless inspection scheme.	Y	Y			Y	Y	Y	Y	Y	Y	Y				Y		Y	Y	Y	Y		

INTERFERENCE WITH PROPERTY RIGHTS AND TRADE SECRETS

Property may be expropriated only in the public interest and for just compensation.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	N	N	Y	N	Y	Y	Y	Y	Y	Y		Y
Property that is an instrument or a result of illegal conduct may be confiscated.	Y	Y	Y		Y	Y	Y	Y	Y	Y	Y		Y	Y		Y	Y	Y				
Evidence of a CWC violation may be used in a license revocation proceeding.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		
Trade secrets are protected property.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y
Officials who reveal trade secrets may be liable (A) criminally, (B) for damages.		A				A	B	A	B	A	B	B					A	B	A			

	US	BRA	CHL	CHN	CZH	BOY	FRA	GER	GRC	HUN	IND	IRA	ISR	ITA	JAP	MEX	MDR	RUS	TUR	UK	UN	USA	
A court may issue an injunction to protect trade secrets.	Y	Y	Y	N	N	Y	Y	Y	Y	N	Y	N		Y	Y	Y	Y	N	N	Y			
Trade secret owners will be entitled to compensation if their trade secrets are lost as a result of a CWC inspection.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y		Y	Y	Y	Y		Y				
Injured parties, including trade secret owners, will forfeit compensation if they are found to be in violation of the CWC.	Y	N	N	Y	N		N	N	N	Y		Y						Y		N			
PENAL LAW IMPLICATIONS OF INSPECTIONS																							
There is a right against compelled self-incrimination.	Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y		Y	Y	Y	Y	Y	Y	
Immunity from prosecution may be granted for self-incriminating testimony.	Y	N	N	N	N		N	N	N	N		Y	Y	N	Y				Y				
Evidence obtained by a CWC inspection may be later used to investigate/prosecute: (A) if CWC procedures were obeyed to legally obtain evidence; (B) despite breach of CWC procedures.	A	A		B	A	A	A	A	A	A		A	B	A	A	A	A	A	A	A		A	
Evidence of a CWC violation can be sent to other domestic authorities.	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	
Evidence of CWC violations may be sent to a foreign country under a mutual legal assistance treaty or CWC requirement.	Y	Y	Y	Y	Y	Y		Y	Y	Y	N	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	Y	

APPENDIX C
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APPENDIX D
QUESTIONNAIRES

D.1 INITIAL QUESTIONNAIRE.

**A Comparative Study of the Legal Rights Implicated by the On-Site
Inspection Provisions of the Draft Chemical Weapons Convention**

I. Purposes of the Project

This is an academic project of an international and comparative nature intended to examine the legal implications of the inspection provisions of the Chemical Weapons Convention (CWC).

The present draft of the CWC contains novel provisions for international inspections of numerous sites within State Parties (described below in the "Overview of the Draft Chemical Weapons Convention"). These provisions are an innovative and important step in ensuring compliance with the international prohibition of the production and possession of these weapons of mass destruction. By virtue of this new approach, the newly established "International Organization" will be authorized to enter into the territory of the State Parties on short notice and without appropriate judicial authorization -- as would normally be required for other government inspections.

This new approach to verifying compliance with treaty obligations may conflict with certain basic rights under the constitution and laws of many countries. In many countries, there exist constitutional provisions, laws, and human rights treaty obligations that protect a number of individual rights including: the right to privacy, the right to be free from illegal search and seizure without valid judicial order, protection from compelled self-incrimination, and the right to be compensated for the seizure of private property. Certainly, the laws on criminal procedure in all countries regulate these matters and protect certain basic rights from undue infringement.

To ensure the international success of the CWC, it is indispensable to assess whether these provisions can be implemented in accordance with diverse national legal systems. In order to make such an assessment, this academic project will involve a comparative study of 25 countries as well as relevant international and regional human rights norms.

II. Methodology

The experts are requested to prepare an analysis in response to the attached questionnaire which is preceded by an overview of the Draft CWC. The relevant provisions of the CWC are also attached.

Upon receipt of the experts' analyses, they will be correlated in a general report, prepared by the co-directors of this project with the cooperation of other experts on comparative criminal procedure.

Following the completion of this report, a document fit for publication will be prepared containing all the reports. This document will serve the purposes of CWC implementation and will also be an important contribution to the knowledge and dissemination of comparative criminal procedure and the protection of these affected rights.

III. Guidelines

- 1) The experts are asked to follow the questionnaire so that the general rapporteurs can better prepare the synthesis report.
- 2) The analyses are expected to be 30-35 pages.
- 3) The analyses should identify the constitutional and normative legal provisions that may exist in the laws on criminal procedure or administrative law wherever applicable as well as relevant supreme court decisions. (Note: There will be three special rapporteurs on United Nations norms and standards, the norms and standards arising out of the European Convention on Human Rights and decisions of the European Commission and the European Court on Human Rights, and relevant decisions arising out of the Inter-American Convention on Human Rights. Therefore, national rapporteurs will not be required to consider these questions except insofar as a decision coming from one of these tribunals may apply to their national legal system.)
- 4) The report should contain footnotes, as opposed to endnotes, and full complete citations. If at all possible, a floppy disk version of the report in Wordperfect 5.0 or 5.1 should be provided. The language of the analysis shall be English.
- 5) Copies of the legal provisions of the relevant texts of the constitutions and laws referenced in the report should be provided, if possible in English.
- 6) The analysis shall be submitted by 15 May 1992 in anticipation of completion of the CWC this summer.

Assume that the Draft Convention is successfully negotiated and signed by a duly authorized representative of your nation's government. The following set of questions concern the rights under your constitution and/or national laws that may be affected by CWC on-site inspections.

I. The Legal Role of International Treaties

1. Does the domestic law of your country require some act of domestic ratification for an international treaty to be legally binding? Briefly explain the ratification process and its legal requirements. Must ratification of the CWC be accompanied by the enactment of domestic legislation? Briefly explain what issues the legislation must address and what provisions it could contain.
2. According to the CWC, the host government will significantly participate in the inspection of facilities within its territory from the moment it issues the first inspector visa until it finishes reviewing the last inspection report. Under domestic constitutional or statutory law, will such participation be sufficient to characterize CWC inspections as "state action" such that whatever limitations apply to domestic law enforcement activities would also apply to CWC inspectors?
3. Is the legality of an international treaty, properly ratified under your nation's domestic law, subject to judicial review? If so, briefly explain the legal bases of such review. If not, how may potential transgressions of the rights of citizens be addressed?
4. Under domestic constitutional law, is the national government obligated to protect national security installations and/or information from disclosure? Briefly discuss the nature of this obligation and what, if any, laws exist to implement this obligation.

II. Relevant Individual Rights and Legal Protections

5. What, if any, are the applicable constitutional provisions and laws which apply to the following essential rights. Briefly identify the source of such a right -- constitution, statute or custom:

A. The right of privacy including limits on the use of surveillance equipment (Does it apply to body searches including biomedical testing?);

- B. The right to be free from unreasonable search and seizure, including any requirements and conditions for a judicial order, notice, and limitations as to the method, time, place, and scope of searches;
 - C. The right to hold private property (including trade secrets) which the government may not take without paying fair compensation, including the requirements and conditions for a lawful taking; and
 - D. The right to be protected from compelled self-incrimination, including the requirements and conditions for obtaining testimony pursuant to a grant of immunity from prosecution based on evidence derived from coerced testimony.
6. Do any or all of these rights extend to commercial entities as well as individuals. Briefly identify any distinctions as to each of these rights for different legal entities or physical sites:
- A. Government-owned facilities;
 - B. Privately-owned facilities;
 - C. Individually-owned property including homes.
7. Do these rights restrict the actions of law enforcement personnel? Do these restrictions have practical implications for day-to-day law enforcement activities. Briefly identify these implications, especially as they may pertain to the conduct of government inspections of private commercial facilities. Would these answers change if the inspection were required by a properly ratified international treaty?
8. May these rights be waived or may a citizen consent to conduct that would, in the absence of consent, contravene these rights? If so, is there any constitutional limit to the effectiveness of waiver or consent? Through what formal process, if any, can waiver or consent be obtained?

III. The Impact of Legislation on Protected Rights

9. What industries, if any, are subject to frequent regulatory inspections? Do the rights listed above limit the inspection of these industries, or does the fact that they are heavily regulated reduce the applicability of these rights? Briefly explain the legal requisites of inspection of these facilities and how such inspections may be distinguished from those of unregulated commercial sites.

10. In the event that CWC on-site inspections could violate the rights of individuals affected by such inspections, to what extent could national legislation to accompany CWC ratification resolve any potential conflict? Briefly explain the legal requirements for balancing or rationalizing treaty obligations with the protection of the legal rights of citizens. Does one set of obligations supersede the other, or is there a method to reconcile potential contradictions?
11. Can legislation limit any or all of the rights listed above? Briefly explain the legal bases that would support such a limitation in the context of government inspections of commercial facilities. What specific provisions must the legislation contain to render inspections, that might otherwise be legally questionable, exempt from the limitations imposed by the requirement to respect these rights?
12. Does national law impose limits on the discretion of government inspectors that might limit when, where, what, or whom might be inspected even if there is just cause for the inspection of a facility in general? Briefly explain the extent and nature of such limits and how they might affect a CWC inspection.

IV. The Right To Seek Judicial Relief/Remedies

13. Are any or all of the rights listed above enforceable by means of a lawsuit? Do individuals and/or commercial entities have the right to sue the government if their rights are violated? Briefly identify the procedure for initiating and pursuing such a lawsuit?
14. In the event that a government inspection transgresses any of these rights, could a court prevent such violations by ordering the government to not conduct or permit the inspection? Briefly identify the legal prerequisites for such an action.
15. May an injured party seek judicial relief in order to compel the government to pay damages? Briefly identify the legal bases for damages, what types of damages may be awarded, and how such damages may be calculated in the event that a government inspection:
 - A. Transgresses any substantive, procedural, or administrative right pertaining to searches and seizures; or
 - B. Results in an illegal taking of private property or damage or destruction to such property.

C. Would any right to damages be forfeited by discovery of conduct in violation of a properly ratified international treaty, e.g., the CWC?

16. Does national law recognize the concept and value of trade secrets? Are trade secrets private property under national law? Briefly explain the nature and extent of the legal protection against unauthorized disclosure of trade secrets and the right to compensation, if any. In the event that a government inspection of a commercial entity results in an improper disclosure of a trade secret, could the victim seek relief through application to a court by means of a lawsuit?

A. Under what conditions, if any, could a court order the government to pay damages to an injured party? Briefly identify the legal bases for damages and how such damages may be calculated.

B. Could the possibility that a trade secret might be disclosed during a government inspection cause a court to order the government to not conduct or permit the inspection?

V. Prosecutorial Use of Evidence Gained During Inspections

17. Does national law distinguish between inspections that are designed for penal purposes from inspections that are designed to monitor compliance with health and safety standards? Would the permissible scope of the inspection vary according to its purpose? Would the permissible range of discretion exercised by inspectors vary according to the inspection's purpose?

18. Under national law, can evidence obtained during a properly authorized government inspection be subsequently used to:

A. Provide the basis for the seizure of other evidence;

B. Provide legal grounds for the arrest of persons associated with the facility;

C. Provide legal grounds for the issuance of a judicial or administrative warrant for a subsequent search at the same place or elsewhere?

D. Prosecute any individual or commercial entity for any legal violation for conduct other than that which occasioned the inspection?

19. In the event that the object of a CWC inspection is a regulated or licensed commercial facility, can any evidence of a violation of the CWC or other law be used to revoke or suspend that license or regulatory permit? Can this be done even if the evidence was obtained in violation of CWC procedures?
20. Under national law, can the evidence seized during a properly authorized CWC inspection be communicated to other law enforcement authorities, including those of another State?

D.2 SUPPLEMENTAL QUESTIONNAIRE.

1. CWC on-site inspections will involve administrative inspections of private commercial facilities. These inspections will not be preceded nor accompanied by any warrant from either the Judicial or Executive branches of government. They will not be refuseable. Will such administrative inspections, properly performed, raise legal difficulties? If so, what?
2. With reference to the constitutional provisions which you have referred to in your report, can the CWC inspection system be implemented by national legislation establishing administrative regulations, outside the criminal law enforcement process, which would enable inspections to proceed without fear of legal impediment?
3. In an administrative inspection system, is it necessary to obtain a warrant or judicial permission or go through a legal or administrative procedure to achieve inspection?
4. The CWC calls for "routine" inspections which will be held on a regular basis and with short notice, and for "challenge" inspections which can happen anywhere, anytime and with only minimal notice. Does this distinction in the types of inspections have any legal significance? Will one type of inspection have more or less legal implications (restrictions) than the other?
5. What are the legal norms for challenging an administrative inspection law? What are the standards of administrative enforcement which would need to be established in that law in order to comply with the Constitution?
6. What are the remedies available to a private entrepreneur to challenge an administrative inspection, and before what judicial authority or administrative tribunal?
7. Is it possible to obtain injunctions to prevent administrative inspections? If so, on what grounds?

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